161 U.S. 583

TRANSCRIPT OF RECORD.

161-583

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 694.

GEORGE W. POST, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED AUGUST 7, 1895.

(15,984.)

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the district court of the United States for the district of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The United States of America and George W. Post, defendant, a manifest error hath happened, to the great damage of the said George W. Post, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 29th of June next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of May, A. D. 1895.

[Seal U. S. Circuit Court, Dist. of Minnesota, Fifth Division.]

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

UNITED STATES OF AMERICA, }
District of Minnesota, Fifth Division, } *ss:*

The Answer of the Judges of the Circuit Court of the United States for the District of Minnesota, in the Eighth Circuit, in within Writ Mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States of America, within mentioned, in a certain schedule to this writ annexed, as within it is commanded.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this — day of ——, A. D. 189–.

Issued at my office, in the city of Duluth, under the seal of said circuit court, the day and year last aforesaid.

OSCAR B. HILLIS, *Clerk,*
By —— ——, *Deputy.*

[Endorsed:] No. 1717 & 1826. United States district court, district of Minnesota, fifth division. United States of America *vs.* George W. Post, defendant. Writ of error. Filed May 30, 1895. Wm. A. Spencer, clerk, by M. H. Wishart, deputy.

2 UNITED STATES OF AMERICA, }
District of Minnesota. }

The Answer of the Judge of the District Court of the United States for the District of Minnesota in Within Writ Mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, within mentioned, in a certain schedule to this writ annexed, as within it is commanded.

U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.

Witness the Hon. Rensselaer R. Nelson, judge of the district court of the United States of America for the district of Minnesota, this 25th day of July, A. D. 1895.

Issued at my office, in the city of Saint Paul, under the seal of said district court, the day and year last aforesaid.

WILLIAM A. SPENCER, *Clerk*,
By CHARLES L. SPENCER,
Deputy Clerk.

3 UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days of the date hereof, pursuant to a writ of error filed in the clerk's office of the United States district court for the district of Minnesota, fifth division, wherein George W. Post is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. R. Nelson, judge of district court of the United States for the district of Minnesota, this 30th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

R. R. NELSON,
Judge of the District Court of the United States for the District of Minnesota.

UNITED STATES OF AMERICA,
District of Minnesota.

Due service of an original citation of which the foregoing is a full, true, and correct copy is hereby admitted, at Duluth, in said district, this 31st day of May, A. D. 1895.

EDWARD C. STRINGER,
United States Attorney, District of Minnesota.

[Endorsed:] Nos. 1717 and 1826. United States district court, district of Minnesota. The United States *vs.* George W. Post. Copy of citation with admission of due service of original by U. S. attorney. Filed July 18, 1895. Wm. A. Spencer, clerk U. S. district court, district of Minnesota, by Charles L. Spencer, deputy.

4 District Court of the United States of America within and for the District of Minnesota.

Pleas before the Honorable Rensselaer R. Nelson, judge of the district court of the United States of America within and for the district of Minnesota.

THE UNITED STATES OF AMERICA, Plaintiff,
against
GEORGE W. POST, Defendant.

Be it remembered that at the stated June term, 1894, of said court, begun and held at the city of Saint Paul, in said district, in the third division thereof, on, to wit, the 26th day of June, A. D. 1894, the grand jury of the United States of America within and for said district, on, to wit, the 20th day of July, A. D. 1894, of said term, came into open court and presented their certain bill of indictment against George W. Post, which was filed of record in said court and is in the words and figures following, to wit:

5 District Court of the United States of America for the District of Minnesota.

At a stated term of the district court of the United States of America for the district of Minnesota, begun and held at the city of Saint Paul, within and for the district aforesaid, on the fourth Tuesday of June, being the 26th day of June, in the year of our Lord one thousand eight hundred and ninety-four, before the Honorable Rensselaer R. Nelson, the judge of said court, assigned to hear and determine divers trespasses, felonies, and misdemeanors in said district committed by the oaths of sixteen good and lawful men of said district, duly empanelled, charged, and sworn as a grand jury of the United States of America within and for said district, it is presented in manner and form following—that is to say:

DISTRICT OF MINNESOTA, *ss*:

The grand jury of the United States of America within and for said district on their oath present that heretofore, to wit, on the 3rd day of February, A. D. 1894, at Duluth, in the State and district of Minnesota, and within the jurisdiction of this court, one George W. Post did then and there wilfully, unlawfully, and feloniously procure and suborn one Sylvester Truesdell to take an oath before a competent officer and person in a case in which a law of the United States authorized an oath to be administered that a certain written declaration, affidavit, certificate, and testimony by him, the said Sylvester Truesdell, subscribed were true, which said affidavit, certificate, declaration, and testimony were untrue, and which said affidavit, certificate, declaration, and testimony the said George W. Post then and there knew were untrue in manner following, to wit: That he, the said George W. Post, did then and there procure and suborn the said Sylvester Truesdell to subscribe his name and make an oath to a certain written affidavit, declaration,
6 certificate, and testimony known as the testimony of a claimant in pre-emption proof; that the said affidavit, declaration, certificate, and testimony were required of the pre-emption claimant by law and the rules and regulations of the Interior Department and the General Land Office of the United States, and were to be submitted to the said General Land Office of the United States relative to the application of the said Sylvester Truesdell, who was then and there a pre-emption claimant for and to the northeast quarter of the southwest quarter and the southeast quarter of the northwest quarter and lots two and three of section five, township sixty-seven north, of range nineteen west, of the 4th P. M.; that in said affidavit, certificate, declaration, and testimony he, the said Sylvester Truesdell, did then and there allege, declare, and swear concerning said land, among other things, in substance and effect as follows: I first settled upon the above-described land on November 17th, 1890; my first act of settlement was clearing and building a house; there were no improvements upon the land when I settled. I have made the following improvements upon the land: a log house 13 x 13, 7 feet high, scoop roof, hewn-timber floor, one door, one window, value $150.00; in the spring of 1891 that house burned down; in July of 1891 I builded a new log house, 14 x 16, 8 ft. high, scoop roof, hewn-timber floor, one window, one door, value $200.00. I first established actual residence upon the said land on the 25th day of November, 1890. I have since resided thereon continuously. I have cultivated the land and made it my home. In 1891, one acre, 10 bushels of potatoes, 18 bushels of turnips, beans, and cabbages; in 1892, two acres, 20 bushels of potatoes, 30 bushels of turnips, cabbages, and one bushel of beans; in 1893, two acres, the same as in 1892; that said affidavit, certificate, declaration, and written testimony he, the said Sylvester Truesdell, then and there subscribed and swore to before A. J. Taylor, the register of the United States land office at Duluth, who was

7 then and there an officer and person competent to administer said oath: that said affidavit, declaration, certificate, and written testimony were then and there a case in which a law of the United States authorized an oath to be administered; that the said affidavit, declaration, certificate, and testimony were then and there false and untrue, and the said Sylvester Truesdell then and there well knew it to be false and untrue, in this, that said Sylvester Truesdell had not made settlement on the above-described land on November 17th, 1890, or at any time prior to the summer of 1893; that he had not made any of the improvements above described or cultivated the said land at all; that he had not established his residence upon the said land or made it his home; that the said matters in said affidavit, declaration, certificate, and testimony falsely and untruly stated as aforesaid were each and all of them material matters and statements, and he, the said George W. Post, did then and there in manner and form as aforesaid feloniously, wilfully, and knowingly procure and suborn him, the said Sylvester Truesdell, to make and subscribe said false statement, declaration, affidavit, and testimony, and did then and there well know said statement, affidavit, declaration, and testimony to be false and untrue, and then and there well knew that he, the said Sylvester Truesdell, knew that said statement, affidavit, declaration, and testimony were false and untrue, and then and there knew that he, the said Sylvester Truesdell, would corruptly and wilfully subscribe and make such false affidavit, declaration, statement, and testimony in manner and form as aforesaid, which is against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

Second count.

And the grand jury aforesaid on its oath aforesaid does further present that the said George W. Post, at Duluth, in the State and district of Minnesota, and within the jurisdiction of this court,
8 on the 3rd day of February, A. D. 1894, did then and there wilfully, unlawfully, and feloniously procure and suborn one Sylvester Truesdell to take an oath before a competent officer and person in a case in which a law of the United States authorized an oath to be administered that a certain written affidavit, declaration, certificate, and testimony by him, the said Sylvester Truesdell, subscribed were true, which said affidavit, declaration, certificate, and testimony he, the said George W. Post, then and there knew were untrue in manner following: George W. Post did then and there procure the said Sylvester Truesdell to subscribe his name and make an oath to a certain written affidavit, declaration, certificate, and testimony, which said affidavit, declaration, certificate, and testimony were required of a pre-emption claimant by the laws of the United States relative to the application and claim made by pre-emption of the said Sylvester Truesdell to the northeast quarter of the southwest quarter and the southeast quarter of the northwest quarter and lots two and three of section five, town-

ship sixty-seven north, of range nineteen west, of the 4th P. M.; that in said affidavit, certificate, declaration, and testimony he, the said Sylvester Truesdell, did then and there allege, declare, and swear concerning said land, among other things, in substance and effect as follows: "I have not settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my own exclusive use or benefit, and that I have not directly or indirectly made any *any* agreement or contract in any way or manner with any person or persons whomsoever by which the title which I may acquire from the Government of the United States shall inure in whole or in part to the benefit of any person except myself;" that the said affidavit, declaration, certificate, and testimony he, the said Sylvester Truesdell, then and there subscribed and swore to before A. J. Taylor, the register of the United States land office at Duluth, who was then and there an officer
9 and person competent to administer said oath; that said affidavit, declaration, certificate, and testimony were then and there a case in which a law of the United States authorized an oath to be administered; that the said affidavit, declaration, certificate, and testimony were then and there false and untrue, and the said Sylvester Truesdell knew them to be false and untrue, in this, that he, the said Sylvester Truesdell, had settled upon and improved said land, so far as the same had been settled upon or improved by him, to sell the same upon speculation and not in good faith to appropriate it to his own exclusive use or benefit, and the said Sylvester Truesdell had theretofore made an agreement and contract with the said George W. Post by which the title which the said Truesdell might acquire from the Government of the United States should inure to the benefit of said Post; that the said Truesdell had not in any manner settled upon or occupied said land prior to the first day of May, A. D. 1893; that the said matters in said affidavit, declaration, certificate, and testimony so falsely and untruly stated as aforesaid were each and all of them material matters and statements and the said George W. Post did then and there, in manner and form as aforesaid, feloniously, wilfully, and knowingly procure and suborn him, the said Sylvester Truesdell, to make and subscribe said false certificate, testimony, declaration, and affidavit, and he, the said Post, then and there knew that said certificate, affidavit, declaration, and testimony were false and untrue, and then and there well knew that he, the said Sylvester Truesdell, knew that said certificate, affidavit, declaration, and testimony were false and untrue, and then and there knew that he, the said Sylvester Truesdell, would corruptly and wilfully subscribe and make said false affidavit, declaration, and testimony in manner and form as aforesaid, which is against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

JOHN E. STRYKER,
Ass't United States Attorney.

10 (Endorsed:) No. 1717. United States district court, district of Minnesota. The United States against George W. Post.

Indictment. A true bill. L. B. Elwood, foreman of the grand jury. Names of the witnesses examined before the grand jury: Sylvester Truesdell, A. J. Taylor, John Evans, A. L. Gray, James Hill, George Neilson. Edward C. Stringer, United States district attorney. Filed July 20th, 1894. William A. Spencer, clerk, by Charles L. Spencer, deputy.

And thereafter and, to wit, on the 20th day of July, A. D. 1894, of said June, 1894, term of said court, at said city of Saint Paul, the said grand jury again came into open court and presented their certain other bill of indictment against George W. Post, which was duly filed of record in said court and is in the words and figures following, to wit:

District Court of the United States of America for the District of Minnesota.

At a stated term of the district court of the United States of America for the district of Minnesota, begun and held at the city of Saint Paul, within and for the district aforesaid, on the fourth Tuesday of June, being the 26th day of June, in the year of our Lord one thousand eight hundred and ninety-four, before the Honorable Rensselaer R. Nelson, the judge of said court, assigned to hear and determine divers trespasses, felonies, and misdemeanors, in said district committed, by the oaths of sixteen good and lawful
11 men of said district, duly empanelled, charged, and sworn as a grand jury of the United States of America within and for said district, it is presented in manner and form following—that is to say:

DISTRICT OF MINNESOTA, *ss:*

The grand jury of the United States of America within and for said district on their oath present that heretofore, to wit, on the 3rd day of February, A. D. 1894, at Duluth, in the State and district of Minnesota and within the jurisdiction of this court, one George W. Post, late of said district, did then and there wilfully, unlawfully, feloniously, and corruptly suborn, instigate, and procure one Sylvester Truesdell to appear in person before one A. J. Taylor, who was then and there the register of the local United States land office at said Duluth, and to make and subscribe before the said A. J. Taylor, register as aforesaid, a certain oath, affidavit, certificate, and testimony in writing in support of the pre-emption claim of one William Rice, which said oath, affidavit, certificate, declaration, and testimony were required by law and the rules and regulations of the Land Office and Interior Department of the United States, and were made relative to the application or claim by pre-emption of the said William Rice, who was then and there a pre-emption claimant for and to the southwest quarter of the northwest quarter of section seventeen (17) and the southeast quarter of the northeast quarter and lot two (2) of section eighteen (18), township sixty-seven

(67) north, of range nineteen (19) west, of the 4th principal meridian, and the said Post did as aforesaid suborn, instigate, and procure the said Truesdell, in and by said oath, affidavit, declaration, certificate, and testimony, falsely to depose and swear, among other things, in substance and to the effect as follows: I have known the claimant, William Rice, for five years; he is about forty years old; claimant settled on his claim November 15th, 1890. His first act of settlement was clearing and building a house. He has upon the land the fol-
12 lowing improvements: A log house, habitable for all seasons, clearing two acres; one root-house. He commenced his residence upon said land November 2nd, 1890. He has cultivated it and made it his home; and thereupon the said Sylvester Truesdell, in consequence and by means of the said wilful and corrupt subornation, instigation, and procurement of the said George W. Post, did then and there appear in person before the said A. J. Taylor, register as aforesaid, and made and subscribed before him an oath, affidavit, declaration, and testimony in writing of and concerning the said claim of the said Rice to the pre-emption of the said land, and then and there by and before the said A. J. Taylor, register as aforesaid, was duly sworn and took his oath (the said Sylvester Truesdell's oath) of and concerning the truth of the matters contained in said oath, affidavit, declaration, certificate, and written testimony, and he, the said A. J. Taylor, was then and there such register as aforesaid and had due and competent authority to administer said oath to the said Sylvester Truesdell in that behalf, and the matter in which he was so sworn and took his oath was then and there a case in which a law of the said United States then authorized an oath to be administered, and it then and there, at and upon the making and subscribing of said oath, affidavit, declaration, certificate, and written testimony as aforesaid, became and was a material question how long the said Truesdell had known the said Rice; at what time the said Rice had settled upon the said land; what was his first act of settlement thereon; what improvements had been made by said Rice upon said land; when said Rice commenced his residence thereon; whether said residence had been continuous; what use said Rice had made of said land, and how much thereof had been broken and cultivated; and the grand jury aforesaid on their oath aforesaid further present that the said Sylvester Truesdell, having so sworn as aforesaid, then and there, in and by said oath,
13 affidavit, declaration, certificate, and written testimony upon his oath so taken as aforesaid before the said A. J. Taylor, who was such register and had such due and competent authority as aforesaid, falsely, wilfully, and corruptly and contrary to his oath so taken did depose and swear, among other things, in substance and to the effect that he, the said Sylvester Truesdell, had known the said William Rice for five years; that said Rice settled on said claim November 15th, 1890; that his first act of settlement was clearing and building a house; that he has upon the land the following improvements: a log house, habitable for all seasons, a clearing of two acres, and one root-house; that he commenced his residence upon said land November 2nd, 1890; that he has culti-

vated the land and made it his home; that in truth and in fact the said Sylvester Truesdell at the time when he was so sworn and took his oath as aforesaid had not known the said Rice for more than one month and did not then know or believe that said Rice had settled upon said land or made improvements thereon of any value whatever, and did not then know or believe that said Rice had commenced his residence upon said land on the 15th day of November, A. D. 1890, or thereafter continued such residence or what use said Rice had made of said land, or that said Rice had broken or cultivated any portion of said land, and that in truth and in fact the said George W. Post at the time when he so suborned, instigated, and procured the said Sylvester Truesdell to make oath and affidavit and to depose and swear falsely as aforesaid then and there knew that said Sylvester Truesdell did not then verily know said Rice and had not known said Rice for five years or for any period in excess of thirty days, or at what time said Rice had settled upon said land, or what was the first act of settlement of said Rice thereon, or what improvements said Rice had made upon said land, or when said Rice commenced his residence thereon, or whether said residence had been continuous, or what use said Rice had
14 made of said land, or how much thereof he had broken and cultivated, and that in truth and in fact the said George W. Post did not then and there believe to be true the said matters which he had so suborned, instigated, and procured the said Sylvester Truesdell to falsely depose and swear as aforesaid, and so the grand jury aforesaid, upon their oath aforesaid, do say that the said George W. Post in the manner and form aforesaid wilfully, unlawfully, feloniously, and corruptly did suborn, instigate, and procure the said Sylvester Truesdell to commit wilful and corrupt perjury, against the peace and dignity of said United States and contrary to the form of the statute in such case made and provided.

JOHN E. STRYKER,
Ass't United States Attorney.

(Endorsed:) No. 1826. United States district court, district of Minnesota. The United States against George W. Post. Indictment. A true bill. L. B. Elwood, foreman of the grand jury. Names of the witnesses examined before the grand jury: Sylvester Truesdell, A. J. Taylor, John Evans, A. L. Gray, James Hill, George Neilson. Edward C. Stringer, United States district attorney. Filed July 20th, 1894. William A. Spencer, clerk, by Charles L. Spencer, deputy.

And thereafter and on, to wit, the 20th day of July, A. D. 1894, the following proceedings were had, which were duly recorded in said court in words and figures as follows, to wit:

Term Minutes, June Term, A. D. 1894.

United States District Court for the District of Minnesota.

JULY 20TH, 1894.

Court opened pursuant to adjournment.
Present: Honorable Rensselaer R. Nelson, judge.

* * * * * * *

15 THE UNITED STATES *vs.* GEORGE W. POST. } No. 1717. Indictment under Sec. 5393, R. S. of U. S.

And now the defendant, George W. Post, appears at the bar of this court personally and by John C. Hollembaek, Esq., his attorney, and he is arraigned upon an indictment presented and filed against him at the present term of this court, charging him with having, at Duluth, in the district of Minnesota, on the 3rd day of February, A. D. 1894, unlawfully and feloniously procured and suborned one Sylvester Truesdell to take and subscribe a false oath and affidavit before a competent officer and person in a case in which a law of the United States authorized an oath to be administered, and, the reading of the indictment having been expressly waived by the said attorney of the said defendant, for a plea to said indictment said defendant doth say that he is not guilty, and leave is granted defendant to withdraw said plea at or before the October, 1894, term of this court, at Duluth, in said district.

THE UNITED STATES *vs.* GEORGE W. POST. } No. 1826. Indictment under Sec. 5393, R. S. of U. S.

And now the defendant, George W. Post, is brought to the bar of this court, and also appears by John C. Hollembaek, Esq., his attorney, and he is arraigned upon an indictment presented and filed against him at the present term of this court, charging him with having, at Duluth, in the district of Minnesota, on the 3rd day of February, A. D. 1894, unlawfully and feloniously pro-

16 cured and suborned one Sylvester Truesdell to take and subscribe a false oath and affidavit before a competent officer and person in a case in which a law of the United States authorized an oath to be administered, and, the reading of said indictment having been expressly waived by the said attorney of said defendant, for a plea to said indictment defendant doth say that he is not guilty, and leave is granted defendant to withdraw said plea at or before the October, 1894, term of this court, at Duluth, in the fifth division of said district.

THE UNITED STATES vs. GEORGE W. POST. } No. 1717. Indictment under Sec. 5393, R. S. of U. S.

Ordered that this cause be, and the same hereby is, continued to the October term, 1894, of this court, at Duluth, in the 5th division of this district.

THE UNITED STATES vs. GEORGE W. POST. } No. 1826. Indictment under Sec. 5393, R. S. of U. S.

Ordered that this cause be, and the same hereby is, continued to the October term, 1894, of this court, at Duluth, in the 5th division of this district.

And thereafter and on, to wit, the 9th day of October, A. D. 1894, the following proceedings were had, which were duly recorded in said court in words and figures as follows, to wit:

17 *Term Minutes, October Term, A. D.* 1894.

United States District Court, District of Minnesota, Fifth Division.

OCTOBER 9TH, 1894.

UNITED STATES OF AMERICA, *District of Minnesota.*

Pleas before the Honorable Rensselaer R. Nelson, judge of the district court of the United States in and for the district of Minnesota.

At a stated term of said court begun and held, pursuant to the act of Congress, at the city of Duluth, in said district, in the fifth division thereof, on the second Tuesday in October, being the ninth day of October, in the year of our Lord one thousand eight hundred and ninety-four, and of our Independence the one hundred and nineteenth year.

Present: Honorable Rensselaer R. Nelson, judge.

* * * * * * *

THE UNITED STATES vs. GEORGE W. POST. } No. 1717. Indictment under Sec. 5383 of R. S. of U. S.

And now comes the defendant, with John C. Hollembaek, Esq., his attorney, and by leave of the court withdraws his plea of not guilty to the indictment herein and files his demurrer to the said indictment and alleges as the ground of said demurrer as follows:

That the grand jury which found and presented the said indictment did not have jurisdiction to enquire into or take cognizance of

the matters and things set forth in the said indictment, in this, to wit, that the offense in said indictment alleged to have been committed, as appears from said indictment, was committed in the fifth division of the said district of Minnesota, and the said indict-
18 ment was found and presented at a term of this court held in the city of Saint Paul, in said district and outside of the limits of said 5th division.

And after the argument of counsel upon and the submission of said demurrer, the court have duly considered the same and being fully advised in the premises, it is—

Ordered that said demurrer be, and the same is hereby, overruled.

To which ruling and order the said counsel of said defendant duly excepts.

THE UNITED STATES *vs.* GEORGE W. POST. } No. 1826. Indictment under Sec. 5383 of R. S. of U. S.

And now comes the defendant, with John C. Hollembaek, Esq., his attorney, and by leave of the court withdraws his plea of not guilty to the indictment herein and files his demurrer to the said indictment and alleges as the grounds of said demurrer as follows:

That the grand jury which found and presented the said indictment did not have jurisdiction to enquire into or take cognizance of the matters and things set forth in the said indictment, in this, to wit, that the offense in said indictment alleged to have been committed, as appears from said indictment, was committed in the 5th division of the said district of Minnesota, and the said indictment was found and presented at a term of this court held in the city of Saint Paul, in said district and outside the limits of said 5th division.

And after the argument of counsel upon and the submission of said demurrer, the court having duly considered the same and being fully advised in the premises, it is—

19 Ordered that said demurrer be, and the same is hereby, overruled; to which ruling and order the said counsel of said defendant duly excepts.

THE UNITED STATES *vs.* GEORGE W. POST. } No. 1717. Indictment under Sec. 5393 of R. S. of U. S.

And now comes the defendant, with John C. Hollembaek, Esq., his attorney, and for plea to the indictment herein charging him with the crime of subornation of perjury said defendant says that he is not guilty.

THE UNITED STATES *vs.* GEORGE W. POST. } No. 1826. Indictment under Sec. 5383 of R. S. of U. S.

And now comes the defendant, with John C. Hollembaek, Esq., his attorney, and for plea to the indictment herein charging him with the crime of subornation of perjury said defendant says that he is not guilty.

And thereafter and on, to wit, the 16th day of October, A. D. 1894, the following proceedings were had, which were duly recorded in said court in words and figures as follows, to wit:

Term Minutes, October Term, A. D. 1894.

United States District Court, District of Minnesota, Fifth Division.

OCTOBER 16TH, 1894.

Court opened pursuant to adjournment.
20 Present: Honorable Rensselaer R. Nelson, judge.

* * * * * * *

THE UNITED STATES *vs.* GEORGE W. POST. } No. 1717. Indictment under Sec. 5393 of the R. S. of U. S.

Ordered that this cause be, and the same is hereby, consolidated with cause No. 1826, of the same title, for the purposes of trial.

THE UNITED STATES *vs.* GEORGE W. POST. } No. 1826. Indictment under Sec. 5393 of the R. S. of U. S.

Ordered that this cause be, and the same is hereby, consolidated with cause No. 1717, of the same title, for the purposes of trial.

And thereafter, at the May term, A. D. 1895, of said court, at Duluth, in the fifth division of said district, and on, to wit, the 16th day of May, 1895, the following proceedings were had, which were duly recorded in said court in the words and figures following, to wit:

Term Minutes, May Term, A. D. 1895.

United States District Court, District of Minnesota, Fifth Division.

MAY 16TH, 1895.

Court opened pursuant to adjournment.
Present: Honorable Rensselaer R. Nelson, judge.

* * * * * * *

THE UNITED STATES *vs.* GEORGE W. POST. } Nos. 1717 and 1826. Indictments under Sec. 5393, R. S. of U. S.

21 The defendant herein, George W. Post, being present in court, to him comes Marlow H. Crocker, Esq., and S. F. White, Esq., his attorneys. The plaintiff appears by Edward C. Stringer, Esq., United States attorney for the district of Minnesota, upon whose motion therefor the cause is by the court ordered for trial.

Whereupon a jury, having been called, comes as follows, to wit, Julius Prigge, T. L. Phelps, L. D. Carter, Henry Hales, Thomas Grogan, Louis J. Galvin, Peter Manderfield, A. S. Collins, C. Botts, M. M. Hoagland, Patrick Carey, and James Caylor, being 12 free and lawful men, who are duly empanelled and sworn as a jury to try the said cause.

Mr. Stringer opens the case on the part of the plaintiff.

A. J. Taylor is sworn, is examined, and testifies as a witness on the part of the plaintiff.

And the further trial of this cause is ordered continued until tomorrow, Friday morning, May 17th, 1895, at ten o'clock a. m.

And thereafter and on, to wit, the 17th day of May, 1895, the following proceedings were had, which were duly recorded in said court in the words and figures as follows, to wit:

Term Minutes, May Term, A. D. 1895.

United States District Court, District of Minnesota, Fifth Division.

MAY 17TH, 1895.

Court opened pursuant to adjournment.
Present: Honorable Rensselaer R. Nelson, judge.

* * * * * * *

THE UNITED STATES *vs.* GEORGE W. POST. } Nos. 1717 and 1826. Indictments under Sec. 5393 of R. S. of U. S.

22 Now this cause coming on to be further tried, the defendant is present in court, with his attorneys, M. H. Crocker and S. F. White, Esqrs., the plaintiff appearing by Edward C. Stringer, Esq., United States attorney for the district of Minnesota.

A. J. Taylor recalled, is further examined, and testifies as a witness on the part of the plaintiff.

G. Henry Le Sage is sworn, is examined, and testifies as a witness on the part of the plaintiff.

Sylvester Truesdell is sworn, is examined, and testifies as a witness on the part of the plaintiff.

George Neilson is sworn, is examined, and testifies as a witness on the part of the plaintiff.

Charles P. Carlson is sworn, is examined, and testifies as a witness on the part of the plaintiff.

John Evans is sworn, is examined, and testifies as a witness on the part of the plaintiff.

James O'Connor is sworn, is examined, and testifies as a witness on the part of the plaintiff.

Edward Lafleur is sworn, is examined, and testifies as a witness on the part of the plaintiff.

James Hill is sworn, is examined, and testifies as a witness on the part of the plaintiff.

And here the plaintiff rests its case.

Mr. S. F. White opens the case on the part of the defendant.

Homer Craig is sworn, is examined, and testifies as a witness on the part of the defendant.

The hour for the adjournment of court for the day having arrived, it is ordered by the court that the further trial of this cause be continued to Saturday morning at ten o'clock of May 18th, A. D. 1895.

23 And thereafter and on the 18th day of May, 1895, the following proceedings were had, which were duly recorded in said court in the words and figures as follows, to wit:

Term Minutes, May Term, A. D. 1895.

United States District Court, District of Minnesota, Fifth Division.

MAY 18TH, 1895.

Court opened pursuant to adjournment.

Present: Honorable Rensselaer R. Nelson, judge.

* * * * * * *

THE UNITED STATES *vs.* GEORGE W. POST. } Nos. 1717 and 1826. Indictments under Sec. 5393 of R. S. of U. S.

This cause coming on this day to be further tried, the defendant herein, George W. Post, is present in court, with M. H. Crocker, Esq., and S. F. White, Esq., his attorneys, and the plaintiff appears by Edward C. Stringer, Esq., United States attorney for the district of Minnesota.

Homer Craig is recalled, is examined, and testifies as a witness on the part of the defendant.

Charles Rosen is sworn, is examined, and testifies as a witness on the part of the defendant.

George W. Post is sworn, is examined, and testifies as a witness on the part of the defendant.

D. H. Campbell is sworn, is examined, and testifies as a witness on the part of the defendant.

William E. Rose is sworn, is examined, and testifies as a witness on the part of the defendant.

William Colvill is sworn, is examined, and testifies as a witness on the part of the defendant.

24 Henry Savage is sworn, is examined, and testifies as a witness on the part of the defendant.

Thomas Shannon is sworn, is examined, and testifies as a witness on the part of the defendant.

George Clisch is sworn, is examined, and testifies as a witness on the part of the defendant.

Bartlett Minot is sworn, is examined, and testifies as a witness on the part of the defendant.

And here the defendant rests his case.

H. M. Hitchcock is sworn, is examined, and testifies as a witness on the part of the plaintiff in rebuttal.

J. R. Carey is sworn, is examined, and testifies as a witness on the part of the plaintiff in rebuttal.

And here again the plaintiff rests its case.

Bartlett Minot is sworn, is examined, and testifies as a witness on the part of the defendant in surrebuttal.

And here again the defendant rests his case, and the testimony is closed.

The hour for the adjournment of court for the day having arrived, the further trial of this cause is ordered continued until ten o'clock Monday morning, May 20th, A. D. 1895.

And thereafter and on, to wit, the 20th day of May, 1895, the following proceedings were had, which were duly recorded in said court in the words and figures as follows, to wit:

25 *Term Minutes, May Term. A. D.* 1895.

United States District Court, District of Minnesota, Fifth Division.

MAY 20TH, 1895.

Court opened pursuant to adjournment.

Present: Honorable Rensselaer R. Nelson, judge.

* * * * * * * *

THE UNITED STATES *vs.* GEORGE W. POST. } Nos. 1717 and 1826. Indictments under Sec. 5393, R. S. of U. S.

And now, this cause coming on to be this day further tried, the defendant herein, George W. Post, is present in court, with his attorneys, Marlow H. Crocker and S. F. White, Esqrs., the plaintiff

appearing by Edward C. Stringer, Esq., United States attorney for the district of Minnesota.

Mr. Crocker sums up the case on the part of the defendant.

Mr. Stringer sums up the case on the part of the plaintiff.

The jury is charged by the court and retires under the charge of an officer duly sworn to keep them, to wit, William Delaney, to consider of their verdict.

THE UNITED STATES *vs.* GEORGE W. POST. } Nos. 1717 & 1826. Indictments under Sec. 5393, R. S. U. S.

And now the jury in the above-entitled action is returned into court and in the presence of the defendant, George W. Post, do render their written verdict, wherein by their foreman they do say that they "do find the defendant guilty on the second and third counts;" and the said jury, being inquired of by the court in respect to said verdict, do say that it is their verdict that they find
26 the said defendant guilty of the charge in the second count of indictment numbered 1717 and guilty as charged in indictment numbered 1826.

And thereafter, on the 20th day of July, 1895, the following paper was filed of record in said court; which said paper is in words and figures following, to wit:

United States District Court, District of Minnesota, 5th Division.

THE UNITED STATES OF AMERICA, Plaintiff, *against* GEO. W. POST, Defendant. } Verdict.

We, the jury in the above-entitled action, do find the defendant guilty on the second and third counts.

PETER MANDERFIELD, *Foreman.*

(Endorsed:) Filed May 20th, 1895. William A. Spencer, clerk, by Charles L. Spencer, deputy.

And thereafter and on, to wit, the 23rd day of May, 1895, the following paper was filed of record in said court; which said paper is in the words and figures following, to wit:

27 United States District Court, District of Minnesota, Fifth Division.

UNITED STATES OF AMERICA *vs.* GEORGE W. POST, Defendant.

And now comes the said defendant, by M. H. Crocker, his attorney, and moves the court now here that judgment be arrested upon the verdict of the jury rendered upon the trial of the cause, for the following reasons:

I. That the indictments in said cause do not charge any public offense under the laws of the United States.

II. That the court had no jurisdiction to try the defendant upon said indictments.

III. That the said indictments are inadequate in allegations, as follows:

a. They do not, nor does either of them, state with sufficient clearness and particularity the facts constituting the alleged perjury of Sylvester Truesdell.

b. They do not show that the alleged perjury of Truesdell was committed in a judicial proceeding.

c. They do not allege facts to show that the register and receiver of the land office had authority under the law to take the testimony, proof, or deposition which, it is alleged, Truesdell falsely verified.

d. They do not show that the register and receiver of the land office aforesaid had authority, under the law or under and by virtue of their appointment to office, to hold or carry on any judicial proceeding or any legal proceeding or inquiry which authorized them to administer oaths to witnesses or to hear testimony or take
28 testimony or to pass upon testimony or to render any judgment, order, finding, conclusion, or decree upon testimony.

e. They do not show that by their appointment said register and receiver, or either of them, had power conferred upon them to administer oaths to witnesses in any proceeding before them or in any judicial proceedings whatever.

f. They do not show that the said register did administer any oath to said Truesdell as a witness.

g. They do not show that said Truesdell was sworn.

h. They do not show that the said register administered any oath to said Truesdell to tell the truth in the alleged proceeding.

i. They do not show that said Truesdell, in the matter and proceeding referred to therein, took any oath as a witness, or took any oath to tell the truth, or took any oath that the evidence, statement, deposition, or declaration alleged to have been subscribed by him was the truth.

j. That upon the trial of said cause there was not any evidence that as to any matter charged in the indictments or either of them the said Truesdell was legally sworn as a witness to tell the truth, or that any matter, deposition, or thing referred to was the truth.

k. That as to the matters in said indictments charged, whereupon said defendant was by said verdict found guilty, there was no evidence that was in fact or in law corroborative evidence of the truth of the testimony of the alleged perjured witness, Truesdell.

IV. That there was not in said indictments any sufficient statement of the acts constituting the crime of subornation of perjury.

V. That no proof whatever was given, upon the trial, of any condition of things or of the existence of any facts which would authorize the taking of any of the evidence referred to in the said indictments, or of the proofs or depositions mentioned therein.
29 There was no legal proof of any pre-emption statement hav-

ing been made by Truesdell, aforesaid, which authorized the taking of such evidence, proof, or deposition as that which said Truesdell is alleged to have falsely verified; and for the reasons last aforesaid and upon the reasons above given the request of the defendant that the court should direct an acquittal of the defendant should have been granted.

M. H. CROCKER,
Attorney for Defendant.
S. F. WHITE,
Of Counsel.

(Endorsed:) Nos. 1717 and 1826. Filed May 23rd, 1895. William A. Spencer, clerk, by T. H. Pressnell, deputy.

And thereafter and on, to wit, the 25th day of May, 1895, the following proceedings were had, which were duly recorded in said court in the words and figures as follows, to wit:

Term Minutes, May Term, A. D. 1895.

United States District Court, District of Minnesota, Fifth Division.

MAY 25TH, 1895.

Court opened pursuant to adjournment.
Present: Honorable Rensselaer R. Nelson, judge.

* * * * * * *

THE UNITED STATES *vs.* GEORGE W. POST. } Indictments Nos. 1717 and 1826 under Sec. 5392, R. S. of U. S.

And now, this cause coming on to be heard upon the motion filed herein for arrest of judgment, the defendant, George W. Post, is present, with S. F. White., Esq., and M. H. Crocker, Esq., his attorneys, who argue in support of said motion, and the plaintiff appears by Edward C. Stringer, Esq., United States attorney for the district of Minnesota, who argues in opposition to said motion. Said motion is, after argument of counsel, submitted to the court, and, the same having been maturely considered by the court and the court being fully advised in the premises, it is by the court—

Ordered that said motion be, and the same hereby is, overruled and denied; to which order defendant duly excepts.

And thereafter and on, to wit, the 29th day of May, A. D. 1895, the following proceedings were had, which were duly recorded in said court in the words and figures as follows, to wit:

Term Minutes, May Term, A. D. 1895.

United States District Court, District of Minnesota, Fifth Division.

MAY 29TH, 1895.

Court opened pursuant to adjournment.
Present: Honorable Rensselaer R. Nelson, judge.

* * * * * * *

THE UNITED STATES, Plaintiff, *against* GEORGE W. POST, Defendant. } Nos. 1717 and 1826. Judgment and Sentence.

Now, on this 29th day of May, A. D. 1895, the United States attorney for the district of Minnesota and the defendant, George W. Post, come into court, and the said United States attorney moves the court that judgment be pronounced against the said defendant upon the verdict duly entered in said court on the 20th day of May, A. D. 1895, of guilty as charged in two indictments filed in said court against him on the 20th day of July, A. D. 1894, for the crime of having on the 3rd day of February, A. D. 1894, at Duluth, in
31 said district, unlawfully and wrongfully and feloniously suborned and procured one Sylvester Truesdell to commit wilful and corrupt perjury in a case in which a law of the United States authorized an oath to be administered, and the said defendant is asked whether he has any legal cause to show why judgment should not be pronounced against him; and the defendant having been heard in that behalf and no cause being shown, it is by the court—

Considered, ordered, and adjudged that the defendant, George W. Post, be imprisoned in the Minnesota State prison, situated at Stillwater, Minnesota, for the term of three (3) years at hard labor, and that he pay a fine of two thousand dollars ($2,000.00), and that said defendant stand committed until this sentence be complied with, and that the United States marshal for the district of Minnesota see that this sentence is executed.

THE UNITED STATES *vs.* GEORGE W. POST. } Indictments Nos. 1717 and 1826 under Sec. 5393 of R. S. of U. S.

And now comes the defendant herein, George W. Post, and by his attorneys, S. F. White, Esq., and Marlow H. Crocker, Esq., applies to the court for a writ of error in the above-entitled action from the Supreme Court of the United States of America, and in open court it is by the court—

Ordered that such writ of error be, and the same is hereby, granted.

And thereafter and on, to wit, the 31st day of May, 1895, the following paper was duly filed of record in said court; which said paper is in the words and figures as follows, to wit:

32 District Court of the United States, District of Minnesota, Fifth Division.

UNITED STATES OF AMERICA
vs.
GEORGE W. POST, Defendant.

The above-named defendant, George W. Post, conceiving himself aggrieved by the judgment rendered on May 29th, 1895, in the above-entitled action, applied forthwith for a writ of error to the Supreme Court of the United States to review the proceedings in said case eventuating in said judgment, which said writ of error was then and there duly allowed by the Honorable R. R. Nelson, the presiding judge of said court, and now, to perfect the record in said cause, the said defendant prays for the allowance of a writ of error from the Supreme Court of the United States, directed to the above-entitled court, to the end that a transcript of the record, proceedings, and papers upon which said judgment was rendered, duly authenticated, may be sent to the Supreme Court of the United States, that the errors therein may be corrected and the defendant restored to all things that he hath lost thereby.

M. H. CROCKER AND
S. F. WHITE,
Attorneys of Appellant and Defendant, Geo. W. Post,
303 and 304 Woodbridge B'ld'g, Duluth, Minn.

And now, to wit, on May 31st, 1895, it is ordered that the writ of error be allowed and issued as prayed for.

R. R. NELSON,
U. S. Dist. Judge.

(Endorsed:) Filed May 31, 1895. William A. Spencer, clerk, by T. H. Pressnell, deputy.

33 And thereafter and on the same day the following paper was duly filed of record in said court; which said paper is in the words and figures as follows, to wit:

Supreme Court of the United States.

In error to the district court of the district of Minnesota, fifth division.

GEORGE W. POST, Appellant,
vs.
THE UNITED STATES OF AMERICA, Respondent.

District Court of the United States, District of Minnesota, Fifth Division.

UNITED STATES OF AMERICA
vs.
GEORGE W. POST, Defendant.

The defendant in the above-entitled cause, having applied for and

been allowed a writ of error, therein alleges the following errors occurring on the trial of said cause and duly excepted to by him on said trial, on account of which he sues out said writ of error:

1. The court erred on the trial of said cause in admitting, against the objection and exception of defendant, any testimony under the second count of the indictment on the Truesdell claim, for the reason that said count does not charge against the defendant any public offense against the laws of the United States.

2. The said court erred on the trial of said cause in overruling the objection of the defendant to the introduction of any evidence on the indictment on account of the Rice claim, and admit-
34 ting such evidence against the objection and exception of defendant, because said indictment does not charge against the defendant any public offense against the laws of the United States.

3. The court erred upon the trial of said cause in refusing to charge the jury as requested by the defendant: "It is necessary for the Government to prove in order to obtain a conviction, and if they do not prove it beyond a reasonable doubt you must acquit, that Truesdell was sworn to tell the truth by Register Taylor on the occasions when he is alleged in the indictments to have committed perjury;" to which refusal defendant did then and there duly except.

4. The court erred upon the trial of said cause in refusing to charge the jury as requested by the defendant: "There is no proof in this case that Truesdell was sworn upon the occasion when the perjury is alleged to have been committed by him, and you must therefore acquit the defendant;" to which refusal to charge as requested the defendant did then and there duly except.

5. The court below erred in refusing to charge the jury as requested by the defendant: "If you should find, under the instructions given you by the court, that the Government has proved that Truesdell committed perjury upon the occasions charged in the indictments, it is not sufficient that the defendant had good reason to believe or even that he knew that Truesdell in giving his testimony was swearing to a falsehood. However great may be the moral obliquity of an attorney who continues to conduct a case in which he knows or has good reason to believe that his client is testifying to a falsehood, he does not thereby become guilty of the offense charged against this defendant;" to which refusal to charge as requested the defendant did then and there duly except.

6. The court erred upon the trial of the cause in refusing the request of the defendant to charge the jury: "In this case you
35 cannot find a verdict of guilty on the uncorroborated testimony of Truesdell, as he confesses himself a perjurer about the very matter in which the defendant is charged with crime, and, unless Truesdell's testimony is so corroborated by other evidence as to convince you beyond a reasonable doubt that the defendant procured him to commit that perjury, you must bring in a verdict of acquittal;" to which refusal of the court to charge as requested the defendant did then and there duly except.

7. The court erred in refusing the request of the defendant to charge the jury: "Testimony of other matters of dispute or difference between the defendant and other parties has been given before you, but these matters were only incidental. The question as to whether or not the defendant was driving a hard bargain with Truesdell and as to which was right in the difficulty over their accounts between the defendant and witness Neilson are not matters to be determined by you, and whether the defendant was right or wrong in these matters has nothing to do with his innocence or guilt of the offense charged in the indictments for which he is being tried, and that is the only question to be determined by you, and must be determined under and according to the evidence produced before you and the law given you by the court;" to the refusal to give which charge as requested the defendant did then and there duly except.

8. The court erred upon the trial of said cause in refusing to charge the jury as requested by the defendant: "There is no corroboration of Truesdell's testimony in the case, and you are therefore directed to bring in a verdict of not guilty;" to which refusal to charge the jury as directed the defendant did then and there duly except.

9. The court erred upon the trial of said cause in refusing to charge the jury as requested by the defendant: "If you find, as the witness Craig testified, that instead of the defendant introducing Rice and Truesdell the day they made their final proofs, as Truesdell testifies, the defendant at or shortly before that time
36 introduced Rice and Craig, and upon inquiry by him was told by Truesdell that he and Rice had been neighbors for several years, you must acquit the defendant upon the indictment with reference to the Rice claim unless you find that he knew that Truesdell was making an untruthful statement in so stating to him;" to which refusal of the court to charge the jury as requested by defendant the defendant did then and there duly except.

10. The court erred upon the trial of said cause in refusing to charge the jury as requested by the defendant: "You are directed to find in favor of the defendant in this case with regard to the Rice claim for the two reasons:

1. That the testimony of Truesdell with regard to his alleged solicitation to commit perjury by the defendant is too vague and indefinite to sustain a conviction on that indictment.

2. That Truesdell's testimony as to this case is entirely uncorroborated;" which refusal to charge the jury as requested was then and there duly excepted to by the defendant.

11. The court erred in charging the jury: "The offense charged is subornation of perjury, and if you are satisfied from the testimony of Truesdell (although he says he committed perjury at that time) that he was induced and instigated by the defendant to commit perjury, and that the defendant knew that the defendant would commit perjury and knew that the statements he was to swear to were false and knowingly false, then, notwithstanding the fact that Truesdell may have committed perjury, if you are satisfied beyond

a reasonable doubt of that fact, the evidence of Truesdell would be sufficient under the law to establish the fact under the rule I have given you that the defendant was guilty of subornation of perjury. Truesdell is not in the position of an accomplice, and even if he were, according to the law which is to be enforced in this court, the testimony of an accomplice uncorroborated is sufficient, for, although in this State we have a law which says that no person shall
37 be convicted on the uncorroborated testimony of an accomplice, that has no application in the Federal courts;" which said charge was the exact converse and opposite of the charge on that subject requested by the defendant and refused by the court, to which the defendant did then and there duly except.

12. The court below erred in refusing the motion of the defendant after the rendition of the verdict in said cause in arrest of judgment therein for the various causes and reasons set forth in said motion, on account of each and every of which said motion in arrest of judgment should have been granted.

Wherefore the defendant for the errors aforesaid asks that said judgment may be reversed, vacated, and held for naught and that he may be restored in all things to that which he has lost thereby.

M. H. CROCKER AND
S. F. WHITE,
Attorneys for Defendant and Appellant.

(Endorsed:) Filed May 31, 1895. William A. Spencer, clerk, by T. H. Pressnell, deputy.

And thereafter and on, to wit, the 24th day of June, 1895, the following order was duly filed of record in said court; which said order is in the words and figures as follows, to wit:

United States District Court, Fifth Division of the District of Minnesota.

UNITED STATES OF AMERICA
vs.
GEORGE W. POST, Defendant.

38 In this cause it appearing that the United States has requested further time to propose amendments to the bill of exceptions proposed by the defendant, and that the same has been granted by the defendant, so that it will be impossible to have return made to the writ of error in this case at the time when the same was originally made returnable—

It is ordered that the time for said writ of error to be made returnable and for the return to be made thereto be, and the same hereby is, extended to and including the first day of August, A. D. 1895.

Dated at St. Paul, Minnesota, this 21st day of June, A. D. 1895.

R. R. NELSON, *Judge.*

(Endorsed:) Filed June 24th, 1895. William A. Spencer, clerk, by Charles L. Spencer, deputy.

And thereafter and on, to wit, the 15th day of July, 1895, the following bill of exceptions was duly filed of record in said court; which said bill of exceptions is in the words and figures as follows, to wit:

39 District Court of the United States, District of Minnesota, Fifth Division.

UNITED STATES OF AMERICA
vs.
GEORGE W. POST, Defendant.

Be it remembered that afterwards, to wit, on the 16th day of May, A. D. 1895, at a stated term of said court begun and held at Duluth, in and for said division and district, before his honor R. R. Nelson, district judge, the issue joined in the above-stated cause between the said parties (*pro ut* the pleadings) came on to be tried before the said judge and a jury duly empanelled, tried, and sworn to try the issues in the case and true deliverance make between the Government and the defendant, the Government being represented by E. C. Stringer, Esq., district attorney, and the defendant being represented by M. H. Crocker, his attorney, and S. F. White, of counsel, and upon the trial of the cause the following proceedings were had:

The Government called as a witness A. J. TAYLOR, who, being duly sworn, testified that he was register of the U. S. land office at Duluth, and has been since July 17th, 1893. Thereupon witness was further questioned concerning the facts in the case, whereupon the defendant objected to the introduction of any evidence on the ground that the indictments do not charge a public offense against any law of the United States, and particularly because there is no allegation in the indictment that the man who was alleged to have committed the perjury, Truesdell, was sworn on the occasion when he was alleged to have committed the offense, so that he was not actually charged to have committed that offense; which ob-
40 jection was overruled by the court; to which ruling of the court the defendant, by his counsel, did then and there duly except, and it was then and there agreed and understood that all the testimony to be introduced by the Government should be under the same objection and exception. The witness was shown a pre-emption proof—Government Exhibit A, testimony of claimant—purporting to be sworn to and subscribed by Sylvester Truesdell before the witness as register of the land office, the affidavit required of pre-emption claimant purporting to be subscribed by Truesdell and sworn to before the witness, and testified that the written portion of the pre-emption proof was in the handwriting of George H. Lesage, and in reference to the affidavits required of pre-emption claimants the district attorney asked the question—Government Exhibit A shown witness—"I show you this paper

and call your attention to the affidavit on the 3rd page of this exhibit and ask if that is your signature." A. "Yes, sir." Q. "I ask you if it was subscribed and sworn to before you at the time it bears date." A. "Yes, sir." Q. "Will you turn to the 4th page, entitled Affidavit required of pre-emption claimant; is that your signature?" A. "Yes, sir." Q. "Did you subscribe that?" A. "I did." Q. "Was or was not that affidavit made before you and sworn to before you at the time it bears date?" A. "Yes, sir." Witness further testified that he knew Truesdell, and that the latter subscribed the affidavit and he knew that the person so subscribing was Sylvester Truesdell.

The district attorney thereupon showed to the witness pre-emption proof—Government Exhibit "B," testimony of witness in the Rice case—and he said that was his signature at the bottom of the page. Q. "I present you Government Exhibit 'B' and call your attention to the second page, entitled 'Pre-emption proof, testimony of witness.' Is that your signature?" A. "Yes, sir." Q. "Was that subscribed and sworn to before you upon the date that it bears?" A "Yes, sir." Q. "By whom?" A. "By the parties sub-
41 scribing their names." Q. "And that is?" A. "Sylvester Truesdell." Witness testified that the written part of that affidavit was in the handwriting of G. H. Lesage, and that the pre-emption proofs were required in his office. The affidavits mentioned were, against the objection and under the exception of the defendant, received in evidence. Witness further said that he did not know whether Post was in the office when these papers were filled up or not; that he went into the proof-room after the affidavits had been filled, signed his name, and did what he had to do; that the records were papers in his office, transmitted from there to Washington and returned by the Interior Department, at Washington, for the purposes of this case.

G. H. LESAGE, called as a witness on the part of the Government, testified that he was proof clerk in the land office at Duluth; was shown the affidavits and pre-emption proofs hereinbefore mentioned, which had been marked Exhibits A and B, identified them, said the written portions thereof, except the signatures, were in his handwriting; that Truesdell signed them after he, witness, had filled them up in accordance with the answers given him by Truesdell, and thereupon the register came in and Truesdell swore to them. Post was in and out when the proofs were being made; whether there all the time he did not remember. Indictment No. 1717 was during the trial and is in this bill of exceptions for convenience called the indictment in the Truesdell case, and indictment No. 1826 is, in like manner, called indictment in the Rice case.

SYLVESTER TRUESDELL was called as a witness on the part of the Government and gave evidence, after being duly sworn, and said that for years prior to 1891 he had lived in Redwood Falls, Minnesota; that in May, 1891, he, for the first time, came to Duluth; that on October 17th, 1893, the witness, Post, the defendant; Neilsen,

Craig, Lefleur, and Johnson went from Duluth to the so-called Truesdell claim; that that was the first time he had ever been north of Duluth or had ever been upon the land, and that he did not even
42 know previous to that where the land was. Witness further testified that in 1893 he met Post in Duluth, and the latter said to him, "Truesdell, don't you want a claim?" He said, "Yes; I do." Post said, "Now, I will tell you what I will do. I got a claim up in Ash River country—not a very good one, but it will pay to enter it under the pre-emption law—and if you prove up that claim for me I will give you $50 and all your expenses." Witness said, "Well, George, I am afraid that will not do. I made a homestead entry up in Lake county in 1891, and it would be a very easy matter for the Government to look it up." Post said, "It would never be looked up at all. I am in with those fellows." Witness continued, "I finally told him I would do so, and I went and did so according to agreement with him." Q. "You say, according to agreement. What agreement was that?" A. "That he was to pay me $50 and my necessary expenses, and I was to turn over the claim to him after I proved up." Q. "Now, what did you do and what did you say in order to carry out that agreement?" A. "We did what was necessary. He went and made out the papers, and when the time came in for the entries—I think it was some days afterwards—I signed the papers." Q. "He gave you the papers that you were to sign?" A. "He made them out. He gave me those entry papers after they were made out." The witness Truesdell further stated: "I first went on the land October 17th, 1893. The defendant, Grady, Neilson, Craig, Lefleur, and Johnson went with us. We came back to Duluth about the middle of November. I stayed only two or three days on the land. The remainder of the time I was at Grady's camp, in section 30, 67, 19, about six miles from the land in question. I found on the land in question a cabin, the ruins of an old cabin, and a clearing. The cabin was in good repair. I went back in November, after staying a few days in Duluth. Craig and Rose went with me. I stayed on the land one night, but went across the claim with Post and Johnson. I do not know who built the camp. I came back to Duluth three or four days before the final proof was made. In making final
43 proof, Post, the defendant, told me what to swear to. He told me I would have to swear to having been on the land before the pre-emption law was repealed, and that I had better put it pretty small; the amount of the improvements for the first year, and then the next a little more, and the next a little more, so as to make it appear that I had been staying there all the time. He told me this after I came down to make final proof, in his office at Duluth."

Q. "I will show you Exhibit 'A.' Just examine this paper I hand you." A. "Yes, sir; I answered all those questions."

Q. "You wrote your name there?" A. "I signed it; after I answered the questions I signed the papers and swore to them before Mr. Taylor."

Q. "Both of these?" A. "Yes; all the statements made therein

are false; I knew them to be false at the time, and Post also knew that they were all false."

The district attorney then showed to the witness the affidavit required of the pre-emption claimant in these words: "I am not the owner of three hundred and twenty acres of land in any State or Territory of the United States, nor have I settled upon or improved said land to sell the same on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement in any way or manner with any person or persons whomsoever by which the title that I may acquire from the United States should inure in whole or in part to the benefit of any person except myself," signed by him, and he stated that the statement was false and known by both him and the defendant at the time he made it to be false, and was made by him at the solicitation of the defendant in carrying out the agreement for him to enter the land for the defendant for $50, hereinbefore stated as having been sworn to by him.

On cross-examination the witness said that he gave to the
44 defendant when he proved up on the land a mortgage upon the land, a promissory note, and a deed for the land; that he supposed that the deed was signed, witnessed, and acknowledged, but he did not read the papers over, as he never expected to see them again, and that he received $20 at that time in money from the defendant.

On redirect examination the witness testified that the defendant gave as the reason why he wanted three papers that he could not put the deed on record, and wanted to make it safe so that witness could not play any dirt on him; he could file the mortgage, but could not place the deed on file. Witness did not read the papers that he signed at the time; did not expect to see them again. He just proved up and went in there to go through with the rest of the formality and to get his pay.

Defendant introduced in evidence the note and mortgage which were given to him by Truesdell the day the final proofs were made. These were for three hundred dollars, made up, the defendant testified, of one hundred dollars loaned by him to Truesdell and paid to the Government for the land, fifty dollars to be advanced by him to Truesdell from time to time for supplies, provisions, &c., between the time of the application and proving up, and one hundred and fifty dollars to be paid him by Truesdell to get Lefleur, whom he had previously located on the land, off the land. Defendant testified that he had been for several years a land looker and locator, looking up claims on Government land that might be valuable to take, and had located Lefleur upon this parcel. Defendant had furnished some provisions and supplies to Truesdell, but had not paid Truesdell's board or furnished him money to pay his board, and at the time of the proof, to make up the fifty dollars, completing the full amount for which Truesdell gave him the mortgage, three hundred dollars, something was due Truesdell, and defendant, on that amount so due him, paid Truesdell twenty dollars, leaving still due him a small amount to make up the full face of the mortgage. The note

45 was, except the signature, in the handwriting of the defendant; the mortgage, except the signature of Truesdell and the other witness besides Col. Colville, is in the handwriting of the latter and was witnessed, and Truesdell's acknowledgment to it taken by Col. Colville.

Truesdell, on cross-examination, said that all the papers made by him to Post with reference to this land and transaction, three in number, note, mortgage, and deed, were made at the same time. The defendant on the stand denied that Truesdell ever did make any deed to him; said that all the papers he made were the note and mortgage introduced in evidence; denied that there was any agreement between him and Truesdell that the latter should enter the land for him or that he should deed the land to him, and testified that he drew the note himself and Col. Colville drew the mortgage and had the same executed by Truesdell, who acknowledged it before him, and it was witnessed by him and the other subscribing witness to the mortgage.

The defendant further called Col. COLVILLE, and his testimony with reference to the execution of the note and mortgage is as follows: He was shown the mortgage and said that the written portion of the body of it is in his handwriting and the instrument was drawn by him and the acknowledgment was taken by him; that he saw a note executed; that there were no other papers executed at that time unless that note was executed by Truesdell to Post; that there was no deed executed at that time; that he is a lawyer by profession; that he and Post then were, ever since have been, and still are partners in the land-office business as to the attorney part of their business, but not as to their locating and their other business; that they then occupied an office, one room, perhaps 12 by 14 feet, with two or three tables in it, one occupied by him, one by Post, and he thought there was a third table occupied by another gentleman, and that the distance between him and Post was slight, probably five feet. On cross-examination the witness said that he saw no

46 deed from Truesdell to Post, but that it was possible for such a deed to have been drafted and he not have seen it, and that he did not remember the execution of the note or whether he drafted the Rice mortgage or not.

When defendant was being examined as a witness on his own behalf he stated that he was to receive from Truesdell one hundred and fifty dollars to get Lefleur off the land, and on cross-examination that he knew Lefleur had abandoned the claim; that he did not remember of saying anything to O'Connor about allowing or paying him anything for the camp, and that on the last trial he testified that he did not allow him anything therefor on proving up, and that his testimony on the last trial was true; that they made no charge to O'Connor for services in proving him up, but that was because he could thereby be the means of bringing them a good many other settlers to prove up, and not on account of the house, and referring to proving up on the Rice claim he said on cross-examination that he had no distinct recollection about that, and any

testimony he should give as to what took place on that must be from his recollection with reference to what was his usual practice; that he knew that Lefleur had abandoned the Truesdell claim at the time he made the contract with him (Truesdell), and charged him the one hundred and fifty dollars to get him off the land, and that this was charged for his knowledge of that fact as an explorer. He further testified on such cross-examination as follows: Q. "Did you not testify before Judge Carey upon that occasion (referring to his preliminary examination in this matter before him) that you sold the minutes to Truesdell without informing him that it was claimed by any one?" A. "No, sir." Q. "Did you not testify before Judge Carey on that occasion that you did not inform Mr. Truesdell that the claim was taken by any person?" A. "No." Q. "And that you were the person who owned the minutes to the land?" A. "I never sold him any minutes. I had no agreement with him for any minutes whatever. I never claimed that I had."
47 Q. "You never claimed that you sold him any minutes?" A. "No, sir." Q. "You did not testify before Judge Cary that you sold him any minutes?" A. "No, sir; not that way." Q. "You did not so testify before Judge Cary?" A. "No, sir." Q. "Did you not testify before Judge Cary that you sold Mr. Truesdell the numbers of the land?" A. "No, sir." Q. "And that for the sale of the numbers of the land you charged him one hundred and fifty dollars?" A. "No, sir." Defendant further testified on this examination on that point that he did say on that examination that he did not inform Truesdell of the fact, which he well knew at that time, that Lefleur, whom he had previously located on the land, had abandoned the same, and that this was in reply to a question of the commissioner on that subject. Defendant further stated that the minutes and numbers of the land meant the description according to the Government subdivisions and condition as to timber, improvements, &c.; that he was personally acquainted with the country in the neighborhood of the claim; that he had taken the minutes of the land; that he paid the Government price directly to the receiver of the land office, taking the receipt issued therefor to Truesdell, as was the universal custom with the attorneys practicing at the land office, which he retained; that he located Lefleur on the Truesdell claim in 1891, at which time he personally inspected the land, and that there was no person then living on the land.

JOHN R. CARY, called as a witness in rebuttal, testified as follows, referring to the preliminary examination held before the witness of the same charge for which the defendant was now on trial: Q. "Upon that examination and when George W. Post was testifying in his own behalf before you did or did he not swear that the one hundred and fifty dollars that he was to receive from Truesdell was for the purchase of the minutes of the Truesdell claim?" A. "He did." Q. "Upon that examination did not Post state that he did not inform Mr. Truesdell that any one was on the land?"
48 A. "He did." Q. "Did he or did he not at that time state that

he sold the minutes to Truesdell without informing him that the land was claimed by any one else?" A. "Yes; he did." On cross-examination the witness stated that he turned to the defendant and said to him that he had admitted in his examination that he had concealed from Truesdell the fact that other parties were on the claim, and that in the first part of his examination he claimed to have sold the minutes to Truesdell for one hundred and fifty dollars, and he asked him the question if he had concealed the fact from Truesdell that other parties were on the land, and he admitted that he had concealed that fact, and said that the last question put by him to the defendant was not, "Is it not a fact that you concealed from Truesdell at the time you made this agreement for one hundred and fifty dollars that this land had been abandoned by Lefleur?"

On surrebuttal WALTER MINOT testified that he was present at the preliminary examination of the defendant; had been special agent of the Government; was a land attorney and felt interested in the case, and that the last question that Cary asked Post on that examination was if it was not a fact that he concealed from Truesdell at the time he obtained the agreement for one hundred and fifty dollars the fact that the land had been abandoned by Lefleur, and Post said that it was.

Truesdell's testimony as to the pre-emption proof, testimony of witness in the Rice claim. is as follows: He was shown the testimony, Exhibit B; identified it; said that it was the statement that he swore to as witness in making final proof in the Rice claim. His testimony of what caused him to make this affidavit is: "The day before the final proof was made I went to Mr. Post's office and Rice was in there. I never seen him before. Post introduced him to me and he said he would want me to go as witness for Mr. Rice—proof witness. He told me what to swear to. I did not know anything about Mr. Rice's claim only I had been over it two or three times." Q. "Just state what Post told you to do." A. "He told me to go and be witness in making final proof for Rice, and
49 I did so." Q. "What, if anything, did he say to you about the making of the final proofs and the answers?" A. "Well, it would be hard——" Q. "In general?" A. "To go and swear to such statement as would be necessary for Rice to make a good proof; he got me to go as proof witness. I had never seen the man before." Q. "Did he or did he not state to you what it would be necessary in order to make the final proof for you to swear to?" A. "He told me some of the things that it would be necessary for me to swear to. I do not remember the words." Q. "Did he or did he not know at the time that you were not acquainted with Mr. Rice?" A. "He certainly must have, for he gave me an introduction to him."

The district attorney then read from the proof certain questions and answers and inquired about them. The first one read was, "How long have you known claimant and what is his age?" A. "About five years, and about forty years." Q. "Was that statement

true or false?" A. "I did not know; I guessed at his age." Q. "The answer for five years, was it true or false?" A. "False, and Post knew it was false; he told me to say I had known him for five years." Q. "How do you know whether Mr. Post at the time you made this statement knew it was false?" A. "He introduced me to the man there in his office; I had never seen the man, and he knew it; he would not give me the introduction." The district attorney then read from the proof: Q. "When did claimant first settle on the claim?" A. "November 15th, 1890." Q. "Was that statement, to your knowledge, true or false?" A. "It was false; I didn't know whether he was ever on the claim; I never saw him on the claim or in the country." Q. "And known by you to be false?" A. "Yes, sir." The district attorney then read from the proof the question and answer: Q. "What use has he made of the land?" A. "Cultivated it and made it his home;" and asked, "Was that answer and part of the affidavit, so far as you are concerned, true or false?" A. "It was false." Q. "And known by you at the time to be false?" A. "Yes, sir; I did not know whether he ever cultivated it or not." Q. "And you say you hadn't seen the land?" A. "I had never seen Rice upon the land; no, sir."

GEORGE NEILSON, a witness on behalf of the Government, testified: I am a steward; live in Duluth and have known defendant six years. In 1893 I was in the employ of defendant, running a compass and taking men to his claims. I knew the Truesdell claim; was on it before the Government survey was made in 1891; went up to the land in 1893 with defendant, Craig, Lefleur, Truesdell, and Johnson. On the trip up there defendant told me that he was going to locate Truesdell on the land in question; that Lefleur had abandoned the claim. I know that defendant located Lefleur on this tract in 1891, because I helped build the camp. I had a conversation with defendant about the shanty or camp that was built on this claim. Defendant told me that the original camp was burned, and that a man by the name of O'Connor had built a new camp, and that he had made arrangements with O'Connor to let Truesdell have this camp. I know the Rice claim; was on it in January, 1891; went there with Jones, Johnson, Corbitt, and defendant. There was a camp on it, but no window or door. Defendant located Dan. Jones on the so-called Rice claim. I helped Jones make some improvements on it and stopped there in February and March, 1891. The defendant was with us at the time. I saw the land again in 1892. Carlson was with me. We were running a compass for Post. The defendant told Carlson and me to take John Grady to the Rice claim, cut some brush, and make it look as though somebody had been living there and put some boughs on the bed and cut underbrush and make it look like a new clearing, and we did so. I saw the Rice claim again in May or June, 1893. It was in the same condition as when we left it in 1892. During the winter of 1891 I was in the vicinity of that land all the time and never saw Rice upon the land or in that country. In March, 1894, in the de-

fendant's office, in Duluth, Gray, the Government special agent, and Rice were talking about Rice's living on the land, and through Rice's answers Gray became suspicious that there was some-
51 thing wrong, and a few days afterwards the defendant told me, in the Central saloon on Superior street, in Duluth, that Rice was a fool, and he had shipped him out of the country. On cross-examination this witness admitted that he had had business difficulties with defendant, and that he had himself testified falsely in an affidavit before Special Agent Gray at Duluth in favor of one Grady when the special agent was investigating claims as to a claim that he (Grady) was attempting to get from the Government, but attempted to excuse himself for this false swearing on the ground that the claimant was poor and sick.

CHARLES CARLSON, a witness in behalf of the plaintiff, testified that he is a woodsman by occupation; is acquainted with defendant, with Neilson, with Truesdell, and has known the Rice claim since 1889 or '90, before the Government survey; that he was upon the Rice claim several times in 1891 and 1892; that he never saw any one living upon the land; that in 1892 he was in the employ of the defendant and was instructed by the defendant to estimate the pine and fix up the shanty on the Rice claim, as he, defendant, was going to file some people upon it when it came into market, and defendant told me to put in a window so as to make it appear that some one had lived on it; that he did as defendant told him; that there was no evidence of any person having lived in the shanty; that Grady and Neilson cut brush as instructed by defendant; that he informed defendant what they had done; that in December of the same year he was upon the land again; that it was in the same condition as when he left it and there was no evidence of anybody having lived there; that he was again upon it in 1894; that he had never seen any one in possession of the shanty on the Rice claim; that in 1891 he passed by the shanty four times every week for three months and never saw any evidence of cultivation and never saw any one there.

JOHN EVANS, a witness on behalf of plaintiff, testified that he is a land-explorer and has been a land-explorer for 14 years; that
52 he knows the Rice claim and has known Rice for 10 or 12 years; that he was one of the party who went on the land in 1891 with the defendant, Jones, Corbitt, and Hill; that said party was in charge of the defendant; that he was in the employ of the defendant; that they went upon the Rice claim, no one in possession, and that the defendant located Jones upon the Rice claim, and that he was upon the land three or four times in 1891 and in November of 1891.

JAMES O'CONNOR, a witness for the plaintiff, testified that he was a farmer and silver miner and formerly lived in Minnesota; that he lived within one and a half miles of the Truesdell claim from December, 1890, until 1894; that in January, 1891, he built a shanty three logs high on the Truesdell claim and finished it in January, 1892; that at that time no other person was in possession

of the land; that he looked it over to see how much pine there was on it; that his was the only shanty on the land; that there had been another built, but it had been burned down; that in the spring of 1893 the defendant came up there and made arrangements for the purchase of the shanty, and that witness agreed to sell it to defendant for $25.00, and that the defendant purchased the shanty from the witness, O'Connor, and agreed to pay the $25.00 in services to be rendered by the defendant to the witness in doing his attorney work and proving up his claim in the land office; if money would satisfy him better Post would give him money; that the defendant came to the camp of the witness when that agreement was made; that there was no cultivation on the land in 1892. Post paid for the shanty in that way by doing my attorney work.

EDWARD LEFLEUR, a witness on behalf of the plaintiff, testified that he has known defendant for seven years; used to work for him; that he knows the so-called Truesdell claim; that he was located upon that claim by the defendant in January, 1891; that Hill and Corbett helped witness build a camp upon the claim in 1891; that it was the same claim that Hill and Evans helped build a camp in 1891.

53 JAMES HILL, a witness on behalf of plaintiff, testified that he has known defendant eight years, and was in the employ of the defendant in 1891 as a woodman; that he knows the so-called Truesdell claim; that he was one of the party who went upon the claim in January, 1891; that he went there with the defendant, Evans, Neilson, Corbitt, Jones, and two Lefleurs; that he knows Ed. Lefleur, and that he knows that Post located Ed. Lefleur upon the Truesdell claim in 1891; that there were no improvements upon the claim in 1891 except a camp three logs high; that he has been on the Rice claim several times; that he was instructed by Post to fix up the camp on the Rice claim and make doors and windows so one could live in it, and that he did so fix up the Rice claim; that he never saw any one living in it, and that there was no evidence of any one having lived in it; the camp was cold and no door nor window; that there was no evidence of any one having occupied it for two years.

Truesdell on cross-examination said that the land in the vicinity of the claims was timbered land, and it might occur that two or more persons might be honestly located on the same claim.

WILLIAM CRAIG testified that he was in Post's office in November, 1893, when Post introduced him and this conversation took place, Truesdell being present: "Post introduced me to Rice and turned to Truesdell and said, 'I suppose you know Rice,' and Truesdell said he did. He didn't state he did. I think he said 'he ought to know; he had been a neighbor of his for years up there, or something like that." Asked if there was anything impressed the conversation on his mind, witness said, "Well, he said that he didn't know; I suppose it was on account of his being a colored man. He knew there was some difference in color, but they were the

same in politics." Rice was colored. He remembered the matter because of that remark. Witness, on cross-examination, stated that he had been familiar with the Rice and Truesdell claims for seven years, and had never seen Rice or Truesdell in that section
54 of the country before 1893; that he had heard two residents in that country say that Truesdell was not in that country in 1890. This was in a dispute between them and Truesdell upon that subject.

GEORGE CLISH, a witness for the defendant, on cross-examination, stated that he had lived from 1890 to 1893 continuously within two miles of Craig's camp, which was a short distance from the Truesdell camp, and had never seen Truesdell in that country prior to 1893.

The defendant admitted on his cross-examination that he had a mortgage of five hundred dollars given him by Rice on the land secured by him through his pre-emption; defendant denied that he had solicited Truesdell to act as proof witness for Rice, and testified that he supposed they were neighbors, as Truesdell told him, and that all his connections with either the Truesdell or the Rice claim, except as to the money due him from the parties, was as their attorney in making their proofs before the land office and for money loaned them, as stated.

H. M. HITCHCOCK, a witness for the Government, testified in rebuttal that he had lived and been in business at Redwood Falls, Redwood county, Minnesota, for twenty-one years, and had known the witness Truesdell for twenty years; that the witness was and had been for many years last past a druggist, and that Truesdell had dealt with him continuously; that Truesdell was living in Redwood Falls and was there continuously from January, 1890, to April or May, 1891; that his statement to that effect was based not only upon his recollection, but also upon his books, which showed that Truesdell obtained drugs from his store during every month of the period from January, 1890, to May, 1891; that Truesdell always, so far as he knew, obtained his goods personally; that he was very frequently in witness' store and always told him about his business, and he thought any absence of his during that time would have been known to and observed by him. On cross-examination this witness admitted that he could not remember about the exact
55 whereabouts of Truesdell at any particular date, although he thought he should have noticed any considerable absence, and an examination of the books showed there were no sales by him to Truesdell between the 8th of November and the 1st day of December, 1890.

Lake county, Minnesota, is the county immediately northeast of St. Louis county, where Duluth is situated, in the northeastern part of the State, and Redwood county is in the southwestern part of the State.

There was other testimony given in the trial of the case in reference to the charge contained in the first count of the indictment

with reference to the Truesdell claim, but the foregoing is a statement of all the testimony given upon the trial of the cause that has any reference to the second count of the indictment with reference to the Truesdell claim or to the indictment with reference to the Rice claim, and also of all the testimony given on the trial of said cause tending in any manner to corroborate the testimony of the witness Truesdell with reference to any of the counts of either indictment.

Thereupon, at the termination of the testimony, the defendant requested the court to charge the jury: "There is no proof in this case that Truesdell was sworn upon the occasion when the perjury is alleged to have been committed by him, and you must therefore acquit the defendant;" which charge the court refused to give; to which refusal the defendant did then and there duly except.

Defendant further requested the court to charge the jury: "It is necessary for the Government to prove in order to obtain a conviction, and if they do not prove it beyond a reasonable doubt you must acquit, that Truesdell was sworn to tell the truth by Register Taylor on the occasions when he is alleged in the indictments to have committed perjury;" which charge the court refused to give, except as given in the general charge; to which refusal the defendant did then and there duly except.

56 The defendant further requested the court to charge the jury: "If you should find under the instructions given you by the court that the Government has proved that Truesdell committed perjury upon the occasions charged in the indictments, it is not sufficient that the defendant had good reason to believe or even that he knew that Truesdell, in giving this testimony, was swearing to a falsehood. However great may be the moral obliquity of an attorney who continues to conduct a case in which he knows or has good reason to believe that his client is testifying to a falsehood, he does not thereby become guilty of the offense charged against this defendant;" which charge the judge refused to give, except as the same was given in the general charge; to which refusal of the court the defendant did then and there duly except.

The defendant further requested the court to charge the jury: "In this case you cannot find a verdict of guilty on the uncorroborated testimony of Truesdell, as he confesses himself a perjurer about the very matter in which the defendant is charged with crime, and, unless Truesdell's testimony is so corroborated by other evidence as to convince you beyond a reasonable doubt that the defendant procured him to commit that perjury, you must bring in a verdict of acquittal;" which charge the court refused to give; to which refusal of the court the defendant did then and there duly except.

The defendant further requested the court to charge the jury: "Testimony of other matters of dispute or difference between the defendant and other parties have been given before you, but these matters were only incidental. The question as to whether or not the defendant was driving a hard bargain with Truesdell and as to which was right in the difficulty over their accounts between the

defendant and the witness Neilson are not matters to be determined by you, and whether the defendant was right or wrong in these matters has nothing to do with his innocence or guilt of the offense charged in the indictments for which he is being tried. That
57 is the only question to be determined by you, and must be determined under and according to the evidence produced before you and the law given you by the court;" which charge the court refused to give, except as it was given in the general charge; to which refusal the defendant did then and there duly except.

The defendant further requested the court to charge the jury: "There is no corroboration of Truesdell's testimony in the case, and you are therefore directed to bring in a verdict of not guilty;" which charge the court refused to give; to which refusal of the court the defendant did then and there duly except.

The defendant further requested the court to charge the jury: "If you find, as the witness Craig testified, that, instead of the defendant introducing Rice and Truesdell the day they made their final proofs, as Truesdell testified, the defendant at or shortly before that time introduced Rice and Craig, and upon inquiry by him was told by Truesdell that he and Rice had been neighbors for several years, you must acquit the defendant upon the indictment with reference to the Rice claim, unless you find that he knew that Truesdell was making an untruthful statement in so stating to him;" which charge the court refused to give, except as the same was given in the general charge; to which refusal of the court the defendant did then and there duly except.

The defendant further requested the court to charge the jury: "You are directed to find in favor of the defendant in the case with regard to the Rice claim for the two reasons:

1. That the testimony of Truesdell with regard to his alleged solicitation to commit the perjury by the defendant is too vague and indefinite to sustain a conviction on that indictment.

2. That Truesdell's testimony as to this case is entirely uncorroborated;" which request the court refused to give; to which refusal of the court the defendant did then and there duly except.

58 The charge of the court, as actually given to the jury, was, as a whole, in the following language:

GENTLEMEN OF THE JURY: The Congress of the United States, having authority to provide for the disposition of the Government lands and to secure claimants' titles thereto, have enacted many laws which are found on the United States statute books. Some of these laws relate to what is called the homestead law, others to the timber-culture act, and others to the mining and mineral lands of the Government, and we had upon the statutes until 1891 laws relative to what are called pre-emption claims, by which, under certain circumstances, land could be secured by a person complying with the law and cultivating and making a settlement upon the land.

In the indictments—for there are two which have been consolidated on the trial before you—the defendant is charged with the

crime of procuring and suborning one Truesdell to make a false affidavit in his final proofs in regard to a claim made under the pre-emption laws enacted by the Government. There are in the indictments three counts, two relating to the pre-emption claim of Truesdell in the first indictment and one in the second indictment relating to one Rice, for whom Truesdell appeared as a witness, in order to make certain statements under oath with regard to what had been done by Rice on his claim.

These indictments, being consolidated and tried together, may be considered virtually as if there had been one indictment with three counts. The first count of the first indictment charges in substance that the defendant induced and procured one Truesdell to go before the register of the local land office in Duluth and under an oath administered to him by the register, who was authorized by law to administer the same, to make certain declarations and statements which were necessary and material to be made in the case of
59 a pre-emption, which declarations and statements were false and untrue and known by Truesdell to be false and untrue; that he wilfully and knowingly made those statements, and that George W. Post, the defendant, procured and induced him so to do knowing that the statements which were made by Truesdell were false and untrue, and that Truesdell would knowingly make those false statements under oath.

The second count of the indictment relates to a certain affidavit which was required by the pre-emption laws to be taken before the final proofs were closed, that the settlement upon the land and the procuring of the land under the law was for the exclusive benefit of the person who was the pre-emption claimant, and that he had made no agreement, directly or indirectly, by which the title which he obtained was to inure to any other person than himself. The form of the affidavit is set forth in the indictment, and it is claimed that the statements and declarations sworn to by Truesdell before the register of the land office, Mr. Taylor, were false and untrue and known by Truesdell to be false, and that he knowingly and wilfully made those statements, and that he was induced and procured so to do by George W. Post, who also knew that the statements made were false and untrue and that Truesdell would swear to these false and untrue statements before the register of the land office.

It is necessary for me to read two statutes which will enable you to properly consider the testimony offered in the case relating to the crimes of perjury and subornation of perjury, for in the first as well as in the second indictment the perjury of Truesdell is involved in the crime of subornation of perjury charged against George W. Post.

Before I call your attention to those statutes I might say that this second indictment relates to the final proofs in the case of one Rice, an alleged pre-emptor of lands in the Duluth land office district, wherein it was necessary under the law that the witnesses should make certain statements with regard to what had been done by Rice

in his settlement and other things to be done by him under his pre-emption claim.

60 It is alleged that Truesdell was a witness and was sworn under oath by Mr. Taylor, who was duly authorized to administer an oath, and that he wilfully and corruptly made false statements, knowing them to be false, and that George W. Post induced and procured him so to do, knowing that Truesdell would make those false statements and knowing that they were false.

The section with regard to perjury provides: "Every person having taken an oath before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribed any material matter which he does not believe to be true, is guilty of perjury." The next section under which the defendant is indicted is, "Every person who procures another to commit any perjury is guilty of subornation of perjury"—that is, that any person who procures another to do what I have read to you in section 5392, which is declared to be perjury, is guilty of subornation of perjury. You see the law says that he must take the oath before a competent tribunal, officer, or person. I suppose you know what an oath is, but I have been requested to state to the jury what an oath is. An oath is a solemn asseveration to some matter or declaration as to its being true, made before some officer who is competent to administer that oath, with such form and such ceremonies as are declared to be binding upon the person making the asseveration or statement; or if he does not declare that any particular form or ceremony is necessary to make it binding upon him, then the law provides the usual manner and form of the oath which is to be administered, and he takes that oath either on the Bible or,

61 as in this State and usually in the Western States, with uplifted hand while in the presence of the Supreme Being and solemnly asseverates that his statement is true. Here it is charged that Truesdell took a false oath, as I have stated to you, before Mr. Taylor, the register, a competent person authorized by law to administer an oath; that this oath so taken was false and knowingly false, and that defendant, George W. Post, knew that the statement was false, and that Truesdell would swear to those false statements, and that he induced and procured him so to do.

The defendant is presumed to be innocent of this offense until he is proved guilty beyond a reasonable doubt. The presumption of innocence remains with him until the jury are thus satisfied of his guilt, and it is necessary for the Government to make such proof as satisfies you beyond a reasonable doubt that the defendant is guilty of the offense as charged in the indictment, either of one count or more or all of them.

I stated to you that the perjury of Truesdell was involved in this offense of subornation of perjury charged against the defendant. That is true, and it is necessary for the Government to introduce proof which satisfies you beyond a reasonable doubt that Truesdell

committed perjury. That is one of the facts involved in this case, and I do not think you will have much difficulty about that. There are some facts which are uncontradicted and about which there is practically no controversy. You have before you the affidavits that were taken before the register of the land office, Mr. Taylor, and the statements contained in that indictment are statements under oath before Mr. Taylor, Truesdell having subscribed to them as being true, being the party who made the oath, and here upon the stand he confessed that those statements which he subscribed to under oath before Mr. Taylor were false. If Truesdell had been indicted for perjury in making these statements before Mr. Taylor and he had pleaded guilty, judgment would have been entered against him as guilty
of perjury, and he would have been sentenced in accordance
62 with the law of the case. He appears now upon the stand confessing and admitting that he made those statements, and while it is necessary for the Government to establish the fact that Truesdell committed perjury, as alleged in the indictments, you are to take the testimony of Truesdell upon the stand and consider whether that is not such testimony as would satisfy you beyond a reasonable doubt that Truesdell did commit perjury at that time. The offense charged is subornation of perjury, and if you are satisfied from the testimony of Truesdell (although he says he committed perjury at that time) that he was induced and instigated by the defendant to commit perjury, and that the defendant knew that Truesdell would commit perjury, and knew that the statements he was to swear to were false and knowingly false, then, notwithstanding the fact that Truesdell may have committed perjury, if you are satisfied beyond a reasonable doubt of that fact, the evidence of Truesdell would be sufficient under the law to establish the fact under the rule I have given you, that the defendant was guilty of subornation of perjury. Truesdell is not in the position of an accomplice, and even if he were, according to the law which is to be enforced in this court, the testimony of an accomplice uncorroborated is sufficient, for, although in this State we have a law which says that no person shall be convicted upon the uncorroborated testimony of an accomplice, that has no application in the Federal courts. But if, in considering the testimony of Truesdell, under all the circumstances you think you must look for some other testimony to sustain it, then you must ascertain if there are any other circumstances in the testimony before you which corroborate in a material point the testimony of Truesdell given upon the stand, and if any other witness has testified directly as to what was done or said by Truesdell, or anything going to establish the fact that perjury was committed by Truesdell
when he swore to the affidavits taken before Mr. Taylor.
63 Again, although the perjury of Truesdell is involved in this case, the testimony must go further, and the jury must be satisfied beyond a reasonable doubt from the evidence that the defendant, George W. Post, knew that Truesdell would commit perjury at the time he swore to these final proofs of his own and as a witness for Rice, and that he instigated and procured him so to do,

and that these statements were wilfully and corruptly false. Unless the Government establishes that fact beyond a reasonable doubt to your satisfaction, the defendant would not be guilty, although you might find that Truesdell was guilty of perjury, for not only is the perjury of Truesdell involved in this case, but the offense is that the perjury that he committed at the time he made the false declarations under oath before Mr. Taylor he was induced to commit and to swear to these declarations under oath by the defendant, George W. Post. You must be satisfied beyond a reasonable doubt that the proof shows that Truesdell was suborned by the defendant to commit the perjury when he swore before Mr. Taylor in his final proofs in his own case and as a witness in the final proofs of Rice.

I said that the testimony must be beyond a reasonable doubt. It is not the weight of testimony that governs, as in civil cases where a preponderance of the testimony which will weigh the scale down is sufficient; but in criminal cases the law is different, and the rule of evidence is that the proof of guilty must be beyond a reasonable doubt. A great many judges have attempted to explain what a reasonable doubt is; and, as a general thing, what has been said in that regard is confusing to the minds of the jury. The jurors are sworn to be governed by the evidence in the case, and it is the evidence they must look to, with the law given to them by the court. In considering the testimony and coming to their conclusion, the reasonable doubt must be one which is based upon the evidence or upon a lack of evidence; in other words, if the jury in con-
64 sidering the testimony impartially have an abiding conviction of the guilt of the defendant, so that they would be willing to act upon it in the more weighty and important matters relating to their own affairs, then that is proof beyond a reasonable doubt. The jury must consider and weigh the evidence; and if there is not such evidence. then the jury would be warranted in finding a verdict of acquittal. If there is such evidence, of course, the Government would be entitled to a verdict of guilty, either upon all the counts or upon one or more of them.

You are the exclusive judges of the credibility of the witnesses that have been introduced before you. In considering the testimony given by the witnesses the jury are not bound to believe everything that is stated upon the stand under oath. Ordinarily, if a witness gives his testimony without disclosing any bias or feeling in the matter, the jury takes the testimony of that witness, if he is not impeached as to his character for truth and veracity, as true, and so considers it. But in weighing testimony the jury has the right to consider the probabilities of the statements made by the witnesses, their opportunities for judging of or hearing or knowing what they have testified to upon the stand, their interest or want of interest in the case, also their manner of testifying upon the stand when giving their evidence, and thus determine what weight or credit they will give to their testimony.

A defendant accused of crime, under the humane provision of the law as it exists now, can offer himself as a witness, and you are

to take his testimony and judge of it the same as you would the testimony of any other witness, recollecting that he is vitally interested in the outcome of the case. He appears before you as an interested witness, and you must take that into consideration in weighing the evidence he has given upon the stand.

I have been presented by counsel for the defense with a number of requests. I think I have covered, though not in the lan-
65 guage here presented, the various questions of law that I consider applicable to this case. Some of these requests I have refused, and those not refused I decline to give, except as they may appear in the charge I have given to the jury, so that defendant may have the benefit of any refusals to charge as requested.

The great questions in this case which it is necessary for the Government to prove beyond a reasonable doubt are: Did Truesdell commit perjury when he testified before Mr. Taylor in his final proofs or as a witness in the final proofs of Rice? Was he induced, if he did commit perjury, was he procured or instigated by the defendant, George W. Post, to commit that perjury? Did the defendant know that Truesdell would make declarations under oath which were false in regard to his own claim or that of Rice, and did he, knowing that Truesdell would commit that perjury, induce him to make those false statements before the land officer, not only knowing that the statements which Truesdell made were false, but that Truesdell would make those false statements?

If these things are established beyond a reasonable doubt, then the defendant is guilty of the offense charged. If Truesdell did not commit perjury, then the defendant would be entitled to a verdict of acquittal, because the perjury of Truesdell is involved in this case, but, as I stated before, I do not think you will have much trouble about that point, although it is for your consideration and I shall leave it to you. Again, if in your opinion Truesdell did commit perjury, but the Government has failed to prove beyond a reasonable doubt that the defendant procured and instigated Truesdell to commit that perjury, then the defendant would be entitled to a verdict of acquittal.

Now, gentlemen, I feel satisfied that you will consider all the evidence in this case, and as worthy and honest jurors, sworn to investigate this case, you will bring in such a verdict as in
66 your opinion is justified by the evidence, and that you will give full justice to the defendant and to the Government under the testimony.

I will give this request asked by defendant:

Unless the Government, in addition to proving the perjury of Truesdell, establishes beyond a reasonable doubt that the defendant procured him to commit that perjury, you must acquit him.

If you find that Truesdell told Post that he settled on the land in 1890, and Post did not know that he was telling him a falsehood in making that statement, you must find a verdict for the defendant, provided he did not know it at the time Truesdell made those proofs.

The foregoing and the exhibits hereto attached is a full statement

of all the testimony given and all the proceedings had on the trial of the above-entitled case so far as the same relates or refers to the second count of the indictment with reference to the Truesdell claim and to the indictment with reference to the Rice claim, and, forasmuch as the same forms no part of the record, this bill of exceptions has been duly settled by the judge who tried the case as a bill of exceptions therein and is thereby made a part of the record in the case.

Dated at Duluth, Minnesota, this 15th day of July, A. D. 1895.

R. R. NELSON, *Judge.* [SEAL.]

67 GOVERNMENT EXHIBIT "A."

Pre-emption Proof. Testimony of Claimant.

SYLVESTER TRUESDELL, being called as a witness in his own behalf in support of his pre-emption claim to the N. E. ¼ of S. W. ¼ and S. E. ¼ of N. W. ¼ and lots 2 and 3, sec. 5, t'p 67 N., R. 19 W., 4th P. M., testifies as follows:

Question 1. What is your name (be careful to give it in full, correctly spelled, in order that it may be here written exactly as you wish it written in the patent which you desire to obtain), and age?

Answer. Sylvester Truesdell; 51 years.

Ques. 2. Are you the head of a family (if so, of whom does it consist), or a single person?

Ans. No; I am single.

Ques. 3. Are you a native-born citizen of the United States? If so, in what State or Territory were you born?

Ans. Yes; Ohio.

Ques. 4. Is your pre-emption claim, above described, within the limits of an incorporated town or selected site of a city or town or used in any way for trade and business? 2nd. Did you leave other land of your own to reside on your present claim? 3rd. Have you ever made a pre-emption filing for land other than you now seek to enter? If so, describe the same. 4th. State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal, or mineral land. (Answer to the point and in detail.)

Ans. 1st. No. 2nd. No. 3rd. No. 4th. It is timber land, suitable for farming purposes when cleared.

Ques. 5. When did you first make settlement on the above-described land? 2nd. What was your first act of settlement? 3. Were there any improvements in the land when you settled?

68 If so, who then owned them, and whether you purchased the title. 4th. What improvements have you made on the land since settlement, and what is the value of same?

Ans. 1st. Nov. 17, 1890. 2nd. Clearing and building house. 3rd. None. 4th. Log house 13 x 13, 7 feet high, scoop roof, hewed-timber floor, 1 door, 1 window, $150.00. In the spring of 1891 that house burned down. In July, 1891, I builded a new log house 14 x 16, 8 ft. high, scoop roof, hewed-timber floor, 1 window, 1 door, $200.00.

Ques. 6. When did you first establish an actual residence on the land you now seek to enter? 2nd. Has your residence thereon since been continuous? 3rd. What use have you made of the land? 4th. How much of the land, if any, have you broken and cultivated since settlement, and what kind and quantity of crops have you raised? 5th. Have you any personal property of any kind elsewhere than on this claim? If so, describe the same and state where the same is kept.

Ans. 1st. Nov. 25, 1890. 2nd. Yes. 3rd. Cultivated it and made it my home. 4th. In 1891, 1 acre, 10 bus. potatoes, 18 bus. turnips, beans, and cabbages. In 1892, 2 acres, 20 bus. potatoes, 30 bus. turnips, cabbages, and 1 bus. beans. 5th. No.

Ques. 7. Are either of the parties who have testified as your witnesses in this case related to you by blood or marriage? If so, state how related.

Ans. No.

(Signed) SYLVESTER TRUESDELL.

I hereby certify that each question and answer in the foregoing testimony was read to claimant before being subscribed and was sworn to before me this 3rd day of Feb'y, 1894.

A. J. TAYLOR, *Register.*

69 *Affidavit Required of Pre-emption Claimant.*

Sec. 2262, Revised Statutes.

I, Sylvester Truesdell, claiming the right of pre-emption under section 2259 of the Revised Statutes of the United States to the N. E. ¼ of S. W. ¼, S. E. ¼ of N. W. ¼, and lots 2 and 3, quarter of section 5, of township number 67 N., of range number 19 W., 4th P. M., subject to sale at Duluth, Minn., do solemnly swear that I have never had the benefit of any right of pre-emption under said section; that I am not the owner of three hundred and twenty acres of land in any State or Territory of the United States, nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my own exclusive use or benefit, and that I have not, directly or indirectly, made any agreement or contract in any way or manner with any person or persons whomsoever by which the title which I may acquire from the Government of the United States should inure in whole or in part to the benefit of any person except myself.

(Signed) SYLVESTER TRUESDELL.

I, A. J. Taylor, register of U. S. land office at Duluth, Minn., do hereby certify that the above affidavit was subscribed and sworn to before me this 3rd day of Feb'y, A. D. 1894.

A. J. TAYLOR, *Register.*

70 GOVERNMENT EXHIBIT "B."

Pre-emption Proof. Testimony of Witness.

SYLVESTER TRUESDELL, being called as a witness in support of the pre-emption claim of William Rice to the S. W. ¼ of N. W. ¼ of section seventeen (17) and S. E. ¼ of N. E. ¼ and lot 2, section eighteen (18), township sixty-seven (67) N., R. 19 W., 4th P. M., testifies as follows:

Question 1. What is your post-office address?

Answer. Tower, Minn.

Ques. 2. How long have you known claimant and what is his age?

Ans. For five years; about 40 years.

Ques. 3. Is claimant married or single? 2nd. Of whom does his family (if any) consist? 3rd. Is he a native or naturalized citizen?

Ans. 1st. He is single. 2nd. No family. 3rd. Native-born.

Ques. 4. Are you familiar with the character of the land? (State specifically the character of this land, whether it is timber, prairie, grazing, or farming.) 2nd. Are there any indications of coal, mineral, or salines thereon? (If so, state plainly the nature.) 3rd. Is it more valuable for agricultural than mining purposes? 4th. Do you reside in its vicinity? 5th. Is it within the limits of an incorporated town or selected town site or used in any way for purposes of trade or business? (Answer to the point and in detail.)

Ans. 1st. I am; it is timber land adapted for farming purposes when cleared. 2nd. Not that I know of. 3rd. It is. 4th. I live about 3 miles from his land. 5th. It is not.

Ques. 5. Is claimant the owner of 320 acres in this or any other State or Territory? 2nd. Did he leave or abandon a residence on his own land in this State to reside on the land herein de-
71 scribed? 3rd. Has he ever filed for other land under the pre-emption law? 4th. Has he mortgaged or agreed to sell the land herein described?

Ans. 1st. Not that I know of. 2nd. Not that I know of. 3rd. Not that I know of. 4th. Not that I know of.

Ques. 6. When did claimant first settle on his claim? 2nd. What was his first act of settlement? 3rd. What improvements has he on the land? 4th. What is the value of such improvements? 5th. When did he commence his residence thereon? 6th. Has his residence been continuous? 7th. What use has he made of the land? 8th. How much land has he broken and cultivated? (Answer to the point and in detail.)

Ans. 1st. Nov. 15, 1890. 2nd. Clearing and building house—log house, habitable for all seasons; clearing 2 acres. 3rd. 1 root-house. He gets his water from a running stream. 4th. $300. 5th. About Nov. 20, 1890. 6th. Yes. 7th. Cultivated it and made it his home. 8th. About 2 acres.

Ques. 7. Are you in any way interested in this claim, or by blood or marriage related to claimant?

Ans. No.

(Signed) SYLVESTER TRUESDELL.

I hereby certify that the foregoing testimony was read to the witness before being subscribed and was sworn to before me this 3rd day of February, 1894.

A. J. TAYLOR, *Register.*

72 "EXHIBIT D."

This indenture, made this third day of February in the year of our Lord one thousand eight hundred and ninety-four, between Sylvester Truesdell (single) of Tower, St. Louis county, Minnesota, party of the first part, and George W. Post of Duluth, St. Louis county, Minnesota, party of the second part:

Witnesseth, that the said party of the first part, for and in consideration of the sum of three hundred dollars, to him in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, doth by these presents grant, bargain, sell and convey to said party of the second part, his heirs and assigns, forever, all that tract or parcel of land lying and being in the county of St. Louis and State of Minnesota, described as follows, to wit: Lots two (2) and three (3) of section five (5) in township sixty-seven (67) north of range nineteen (19) west 4th principal meridian, containing eighty-one 44 acres more or less, according to the Government survey.

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, unto the said party of the second part, his heirs, and assigns, forever. And the said Sylvester Truesdell, party of the first part, doth hereby covenant with the said party of the second part, his heirs and assigns as follows: First, that he is lawfully seized of said premises; second, that he has good right to convey the same; third, that the same are free from all encumbrances; and fourth, that the said party of the second part, his heirs and assigns shall quietly enjoy and possess the same; and that the said party of the first part will warrant and defend the title to the same against all lawful claims.

73 Provided nevertheless, that if the said Sylvester Truesdell, party of the first part, his heirs, executors or administrators, shall well and truly pay or cause to be paid to said George W. Post, the said party of the second part, his heirs, executors, administrators or assigns, the sum of three hundred dollars, and interest, according to the conditions of the promissory note made by the party of the first part to the said party of the second part for the said sum of three hundred dollars, due with interest thereon from date until paid at the rate of ten per cent. per annum, in three months from date, and bearing even date herewith, then this deed to be null and void, otherwise to be and remain in full force and effect. But if

default shall be made in the payment of the said sum of money, or interest, or any part thereof, at the time and in the manner hereinbefore specified for the payment thereof, the said party of the first part, in such case doth hereby authorize and fully empower the said party of the second part, his heirs, executors, administrators or assigns, to sell the said hereby-granted premises at public auction, and convey the same to the purchaser in fee-simple, agreeably to the statute in such cases made and provided, and out of the moneys arising from such sale to retain the principal and interest which shall then be due on the said promissory note, together with all costs and charges, and also the sum of twenty-five dollars, as attorney's fees, and pay the overplus (if any) to the said party of the first part, his heirs, executors, administrators or assigns.

And the said Sylvester Truesdell, the said party of the first part, doth further covenant and agree, to and with the said party of the second part, his heirs, executors, administrators and assigns, to pay said sum of money above specified at the time and in the manner above mentioned, together with all costs and expenses, if any there shall be and also in case of the foreclosure of this mortgage, the sum of twenty-five (25) dollars, as attorney's fees, in addition
74 to all sums and costs allowed in that behalf by law, which said sum is hereby acknowledged and declared to be a part of the debt hereby secured, and which shall be assessed and payable as part of said debt, and that he will pay all taxes and assessments of every nature, that may be assessed on said premises or any part thereof, previous to the day appointed by law for the sale of lands for town, city, county or State taxes.

In testimony whereof the said party of the first part has hereunto set his hand and affixed his seal the day and year first above written.

SYLVESTER TRUESDELL. [SEAL.]

Signed, sealed, and delivered in presence of—
THOS. GAUGHAN,
WILLIAM COLVILLE, *Witnesses.*

STATE OF MINNESOTA, }
County of St. Louis, } *ss:*

On this third day of February, A. D. 1894, before me, a notary public within and for said county, personally appeared Sylvester Truesdell (a single man), to me well known to be the same person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

WILLIAM COLVILLE,
Notary Public.

(Endorsed:) No. 817. Mortgage deed. Sylvester Truesdell to George W. Post. Office of register of deeds. State of Minnesota, county of St. Louis, *ss:* I hereby certify that the within deed was filed in this office for record on the 5th day of February, A. D. 1894, at 3 o'clock p. m., and was duly recorded in Book 92 of Mortgages,

page 415. Amos Shephard, register of deeds, by B. O. Loe, deputy. Government Exhibit D.

75 GOVERNMENT EXHIBIT E.

DULUTH, MINN., *Feb. 3rd*, 1894.

Ninety days after date I promise to pay to the order of George W. Post three hundred dollars, at American Exchange bank, for value received, with interest from date at the rate of 10 per cent. per annum.

$300.00. SYLVESTER TRUESDELL.

(Endorsed :) Filed July 15th, 1895. William A. Spencer, clerk, by Charles L. Spencer, deputy.

76 UNITED STATES OF AMERICA :

District Court of the United States, District of Minnesota.

I, William A. Spencer, clerk of said district court, do hereby certify and return to the honorable the justices of the Supreme Court of the United States that the foregoing, consisting of 75 pages, numbered from 1 to 75, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment, and all other proceedings in said case entitled The United States of America, plaintiff, against George W. Post, defendant, and of the whole thereof as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging a copy of the original citation, with admission by the United States attorney for said district of service thereof.

In witness whereof I have hereunto set my official signature as the clerk aforesaid and the seal of said district court, at the city of Saint Paul, in the district of Minnesota, this 25th day of July, A. D. 1895.

U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.

WILLIAM A. SPENCER, *Clerk*,
By CHARLES L. SPENCER,
Deputy Clerk.

77 Supreme Court of the United States.

In error to the district court of the United States for the district of Minnesota, fifth division.

GEORGE W. POST, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

The plaintiff in error alleges the following errors occurring in the action of the court below, wherefore he prosecutes this his writ of error:

I. The court erred on the trial of said cause in admitting, against the objection and exception of plaintiff in error, any testimony

under the second count of the indictment on the Truesdell claim, indictment No. 1717, for the reason that the said count does not charge against said plaintiff in error, defendant in said cause, any public offense against the laws of the United States.

II. The said court erred on the trial of said cause in overruling the objection of the defendant to the introduction of any evidence on the indictment on account of the Rice claim, indictment No. 1826, and admitting such evidence against the objection and exception of plaintiff in error, defendant below, because said indictment does not charge against the plaintiff in error, defendant below, any public offense against the laws of the United States.

III. The court erred upon the trial of said cause in refusing to charge the jury as requested by the plaintiff in error: "It is necessary for the Government to prove in order to obtain a conviction, and if they do not prove it beyond a reasonable doubt you must acquit, that Truesdell was sworn to tell the truth by Register Taylor on the occasion when he is alleged in the indictments to have committed perjury;" to which refusal plaintiff in error did the and there duly except.

IV. The court below erred upon the trial of said cause in refusing to charge the jury as requested by the plaintiff in error:
78 "There is no proof in this case that Truesdell was sworn upon the occasion when the perjury is alleged to have been committed by him, and you must therefore acquit the defendant;" to which refusal of the court to charge as requested the plaintiff in error did then and there duly except.

V. The court below erred in refusing to charge the jury as requested by the plaintiff in error: "If you should find under the instructions given you by the court that the Government has proved that Truesdell committed perjury upon the occasions charged in the indictments, it is not sufficient that the defendant had good reason to believe or even that he knew that Truesdell, in giving this testimony, was swearing to a falsehood. However great may be the moral obliquity of an attorney who continues to conduct a case in which he knows or has good reason to believe that his client is testifying to a falsehood, he does not thereby become guilty of the offense charged against the defendant;" to which refusal to charge as requested the plaintiff in error did then and there duly except.

VI. The court below erred in refusing to charge the jury, as requested by the plaintiff in error, upon the trial of the cause: "In this case you cannot find a verdict of guilty on the uncorroborated testimony of Truesdell, as he confesses himself a perjurer about the very matter in which the defendant is charged with crime, and unless Truesdell's testimony is so corroborated by other evidence as to convince you beyond a reasonable doubt that the defendant procured him to commit that perjury you must bring in a verdict for acquittal;" to which refusal of the court to charge as requested the plaintiff in error did then and there duly except.

VII. The court below erred in refusing the request of the plaintiff in error to charge the jury: "Testimony of other matters of dis-

pute or difference between the defendant and other parties has been given before you, but these matters were only incidental.

79 The question as to whether or not the defendant was driving a hard bargain with Truesdell and as to which was right in the difficulty over their accounts between the defendant and witness Neilsen are not matters to be determined by you, and whether the defendant was right or wrong in these matters has nothing to do with his innocence or guilt of the offence charged in the indictments for which he is being tried, and that is the only question to be determined by you, and must be determined under and according to the evidence produced before you and the law given you by the court;" to the refusal to give which charge as requested the plaintiff in error did then and there duly except.

VIII. The court erred upon the trial of said cause in refusing to charge the jury as requested by the plaintiff in error: "There is no corroboration of Truesdell's testimony in the case, and you are therefore directed to bring in a verdict of not guilty;" to which refusal to charge the jury as requested the plaintiff in error did then and there duly except.

IX. The court erred upon the trial of said cause in refusing to charge the jury as requested by the plaintiff in error: "If you find, as the witness Craig testified, that instead of the defendant introducing Rice and Truesdell the day they made their final proofs, as Truesdell testified, the defendant at or shortly before that time introduced Rice and Craig, and upon inquiry by him was told by Truesdell that he and Rice had been neighbors for several years, you must acquit the defendant upon the indictment with reference to the Rice claim, unless you find that he knew that Truesdell was making an untruthful statement in so stating to him;" to which refusal of the court to charge the jury as requested by him the plaintiff in error did then and there duly except.

X. The court below erred upon the trial of said cause in refusing to charge the jury as requested by the plaintiff in error: "You are directed to find in favor of the defendant in this case with regard to the Rice claim for the two reasons:

80 1. That the testimony of Truesdell with regard to his alleged solicitation to commit perjury by the defendant is too vague and indefinite to sustain a conviction on that indictment.

2. That Truesdell's testimony as to this case is entirely uncorroborated;" which refusal to charge the jury as requested was then and there duly excepted to by the plaintiff in error.

XI. The court erred in charging the jury: "The offense charged is subornation of perjury, and if you are satisfied from the testimony of Truesdell (although he says he committed perjury at that time) that he was induced and instigated by the defendant to commit perjury, and that the defendant knew that Truesdell would commit perjury and knew that the statements that he would swear to were false and knowingly false, then, notwithstanding the fact that Truesdell may have committed perjury, if you are satisfied beyond a reasonable doubt of that fact, the evidence of Truesdell would be sufficient under the law to establish the fact under the rule I have

given you that the defendant was guilty of subornation of perjury. Truesdell is not in the position of an accomplice, and even if he were, according to the law which is to be enforced in this court, the testimony of an accomplice uncorroborated is sufficient, for, although we have in this State a law which says that no person shall be convicted on the uncorroborated testimony of an accomplice, that has no application in the Federal courts;" which said charge was the exact converse and opposite of the charge requested by the plaintiff in error and refused by the court; to which he did then and there duly except.

XII. The court below erred in refusing the motion of the plaintiff in error, after the rendition of the verdict in said cause, in arrest of judgment therein for the various causes and reasons set forth in said motion, on account of each and every of which said motion in arrest of judgment should have been granted.

81 XIII. The court below erred in overruling the demurrer of the plaintiff in error to said indictment No. 1717, and holding that the court had jurisdiction to try him on said indictment notwithstanding his objection to its jurisdiction set out in said demurrer.

XIV. The court below erred in overruling the demurrer of the plaintiff in error to said indictment No. 1826, and holding that the court had jurisdiction to try him on said indictment notwithstanding his objection to its jurisdiction set out in said demurrer.

Wherefore the plaintiff in error asks that for the errors aforesaid said judgment may be reversed, vacated, and held for naught, and that he may be in all things restored to what he hath lost thereby.

S. F. WHITE,
Attorney and of Counsel of Plaintiff in Error.

[Endorsed:] Supreme Court of the United States. George W. Post, plaintiff in error, *vs.* The United States of America, defendant in error. S. F. White, Duluth, Minnesota, attorney for pl'ff in error.

Endorsed on cover: Case No. 15,984. Minnesota D. C. U. S. Term No., 694. George W. Post, plaintiff in error, *vs.* The United States. Filed August 7th, 1895.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

GEORGE W. POST, Plaintiff in Error,
v.
THE UNITED STATES. } No. 694.

Stipulation.

In this cause the following stipulation is made this 7th day of February, 1896:

I.

It being desired, in behalf of the United States, that the record in this court be corrected so as to conform to the record in the trial court, suggestion of diminution of the record and motion for certiorari to have the record corrected is hereby made, and notice of the same and all formalities in respect thereto are hereby waived.

II.

It appearing that the portion of the record desired to be brought up is embraced in the paper hereto attached and made part hereof, the same shall be treated as if sent up in obedience to a writ of certiorari, and it shall be printed and attached to and become a part of the record in this court in this cause.

S. F. WHITE,
Attorney for George W. Post.
J. M. DICKINSON,
Assistant Attorney General.

United States District Court for the District of Minnesota.

Term Minutes, January Term, A. D. 1896.

FEBRUARY 3RD, 1896.

Present: Honorable Rensselaer R. Nelson, judge.

THE UNITED STATES OF AMERICA
vs.
GEORGE W. POST. } Indictments Nos. 1717 and 1826 under Sec. 5493 R. S. of U. S.

In the above-entitled case an order to show cause why the record herein should not be amended so as to contain and present a full and complete record of the proceedings had herein having been duly issued herein on the application of the United States district

attorney for the district of Minnesota, and said order having been duly served upon the attorney for the defendant, George W. Post, as provided in said order, and said order to show cause duly coming on to be heard this 3rd day of February, A. D. 1896, by stipulation in open court of all parties hereto, the defendant, George W. Post, being represented by his counsel, S. F. White, Esq., and the court having its attention called to the record made and entered in this case on the 20th day of July, A. D. 1894, and it satisfactorily appearing to the court, upon inspection of said record so made and entered, that the same is not a full and correct record of the proceedings then had, and it further satisfactorily appearing that it is not fully and clearly shown from any of the records made and entered in said case what proceedings were had therein prior to the filing of the indictments therein, and particularly prior to the 12th day of July, A. D. 1894:

Now, therefore, after hearing the said George W. Post, by his counsel, S. F. White, Esq., in opposition thereto, and on motion of E. C. Stringer, United States district attorney, after and upon inspection of the records herein, it is by the court—

Ordered that the records herein be, and the same are hereby, amended, *nunc pro tunc*, as of July 20th, A. D. 1894, as follows, to wit:

THE UNITED STATES *vs.* GEORGE W. POST. } Indictments Nos. 1717 and 1826 under Sec. 5493 R. S. of U. S.

Be it remembered that at the June, A. D. 1894, term of this court and on the 5th day of July, A. D. 1894, at St. Paul, Minnesota, a grand jury of the United States of America in and for the district of Minnesota was duly empanelled and on that day duly entered upon the discharge of its duties in and for the entire district of Minnesota, and was continuously in session from and inclusive of the said 5th day of July, A. D. 1894, to and inclusive of the 20th day of July, A. D. 1894, on which last day the said grand jury made its final report to the court and was discharged by order of this court, and that on said last-mentioned day it returned into court the indictments herein; that all of the persons whose names are endorsed upon the indictments herein were duly summoned by subpœnas as witnesses in the cases of The United States *vs.* George W. Post before said grand jury prior to the said 5th day of July, A. D. 1894, and that in obedience to said subpœnas said witnesses were in actual attendance upon this court prior to the 12th day of July, A. D. 1894.

UNITED STATES OF AMERICA, *District of Minnesota, Third Division,* } *ss*:

I, William A. Spencer, clerk of the district court of the United States of America for the district of Minnesota, do hereby certify that I have carefully compared the foregoing copy with the original

thereof, which is in my custody as such clerk, and that such copy is a full, true, and correct transcript from an original order of said court made in the case of The United States against George W. Post as said order appears entered and of record upon the term minutes of said court for this day.

Seal U. S. Dist. Court, Dist. of Minnesota, Third Division.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at St. Paul, in said district, this third day of February, A. D. 1896.

WM. A. SPENCER, *Clerk*,
By CHARLES L. SPENCER, *Deputy*.

[Endorsed:] United States district court, district of Minnesota, third division. The United States *vs.* George W. Post. Certified copy of order.

Endorsed on cover: Case No. 15,984. Supreme Court U. S., October term, 1894. Term No., 694. George W. Post, P. E., *vs.* The United States. Stipulation and addition to record. Filed February 18, '96.

Office Supreme Court U. S.
FILED.
OCT 12 1895
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE W. POST, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 694.

MOTION TO ADVANCE.

Office Supreme Court U. S.
FILED.
OCT 12 1895
JAMES H. McKENNEY,
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OCTOBER TERM, 1895.

GEORGE W. POST, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 694.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE W. POST, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 694.

MOTION TO ADVANCE.

The plaintiff in error was indicted in the district court of the United States for the district of Minnesota, under section 5393 of the Revised Statutes, for having suborned and procured one Sylvester Truesdell to take and subscribe a false oath and affidavit before a competent officer in a case in which a law of the United States authorized an oath to be administered, to wit, in the prosecution of the preemption claim of the said Truesdell before the register of the land office of the United States at Duluth. He was also indicted for suborning and procuring the said Truesdell to commit perjury before the same officer in the preemption claim of one William Rice. He was tried and convicted, and on the 29th of May last sentenced to three years' imprisonment at hard labor and to

pay a fine of $2,000. He was released on bail in the sum of $5,000 on the 31st of the same month pending the decision of this court on his writ of error.

The Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing on such day during the term as may be convenient to the court.

Notice of this motion has been served on the counsel for the plaintiff in error, and proof of service thereof filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

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The Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing on such day during the term as may be convenient to the court.

Notice of this motion has been served on the counsel for the plaintiff in error, and proof of service thereof filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

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Office Supreme Court U. S.
FILED.
OCT 14 1895
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE

UNITED STATES.

GEORGE W. POST,
Plaintiff in Error.

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Affidavits of Plaintiff in Error

UPON MOTION TO ADVANCE CASE.

S. F. WHITE,
Duluth, Minnesota,
Attorney for Plaintiff in Error.

J. L. THWING,
PRINTER AND BINDER,
DULUTH, MINN.

SUPREME COURT

OF THE

United States.

GEORGE W. POST,
Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

STATE OF MINNESOTA, } ss.
COUNTY OF ST. LOUIS. }

George W. Post, being duly sworn, deposes and says that he is plaintiff in error in the above entitled cause and has been shown the notice of motion for the advancement of said cause served upon his attorney in this court, S. F. White, and

that he would gladly join in such motion but for one fact that compels him to ask that if the cause be advanced upon the calendar, that the hearing thereof be not earlier than six months from this date, and that is that his present pecuniary condition is such that it is impossible for him to pay the necessary expense of printing the record and paying his attorney for his services in the case. Deponent further says that an examination of the files and records of the case shows the fact to be as it really was, that he was unable to procure the attendance of his witnesses at the last trial of his case, on account of his inability to pay them, except by means of the compulsory process of the court, issued upon its order duly made because of deponent's financial inability otherwise to procure their attendance and that it was only by the very greatest difficulty that, by the assistance of his friends he was enabled to pay the necessary expense of procuring a return and docketing the case in this court. Deponent further says that he is informed by his attorneys who tried the case in the court below, S. F. White, an attorney of this court, and M. H. Crocker, both attorneys residing at Duluth, Minnesota, that, in their opinion, there was clearly error in the decision and ruling of the court below upon the trial of said cause on account of which that decision must, when the same shall be heard and passed upon by this court, be reversed and held for naught.

Deponent says that he does not make this affidavit or oppose the motion for the advancement of this cause for the purposes of delay but merely for the reason that he desires that the case may be fully presented to this court upon the merits thereof, and that equal and exact justice may be done him in this matter. Deponent further says that he is more anxious than any one else possibly can be to have his case heard and decided by this court at as early a date as it is possible for him to present it properly before the court, as, by the verdict of the jury, a most grievous wrong has been done him, and he was convicted of an offense of which he was not guilty, and which greatly impedes him in the prosecution of his business through the odium thus unjustly brought upon him, and he therefore asks the court to set the hearing of this cause, if advanced at all, at a time during this term, at least six months from the opening thereof, at which time he believes he can be able to raise the means to have his case heard by this court.

GEORGE W. POST.

Sworn to and subscribed before me this 2d day of October, A. D. 1895.

THOMAS J. McKEON,

Notary Public, St. Louis County, Minnesota.

[Notarial Seal.]

STATE OF MINNESOTA, } ss.
COUNTY OF ST. LOUIS. }

Shubael F. White, being duly sworn deposes and says that he is an attorney of this court, and one of the attorneys who tried the cause in the court below, that he has known the plaintiff in error a number of years and verily believes that he was unjustly convicted of the offense charged against him, and feels confident that the judgment appealed from will be reversed by this court, if the same can be properly presented to it. Deponent further says that a principal error in this case is this: The offense of which plaintiff was convicted was that of subornation of perjury upon two of three different charges made against him thereof upon which he was tried. Upon the trial, his attorneys requested the court below to charge the jury that it could not convict the defendant, plaintiff in error, upon the uncorroborated testimony of the alleged perjurer, and that if his testimony was uncorroborated they must acquit the defendant, which the court refused to do, and to this refusal defendant did then and there duly except, and this refusal is made the basis for one of his assignments of error, all of which appears from the record and assignments of error now on file in this court, and, it seems to this deponent, is fatal to the action of the court below, without reference to the other errors alleged in the action of the

court below and without any waiver of such other errors. Deponent further says that it is evident, in deponent's opinion, from an examination of the bill of exceptions in the case, certified copy of which is on file therein in this court as part of the record, that there was no corroborative testimony in the case against the defendant below, plaintiff in error, of the testimony of Sylvester Truesdell, the alleged perjurer, who, according to his own testimony, committed the perjuries on account of the alleged subornation of which defendant was convicted, at the solicitation of defendant, with respect to the alleged offenses of which he was convicted. Deponent further says that he knows something of the financial circumstances of the plaintiff in error, that he knows, of his own knowledge, that he has as yet paid nothing to his attorneys who tried the case in the court below and believes that the reason therefor has been and is that he has been unable to raise the money, that they have confidence in his honesty and ultimate ability to pay them, and deponent believes from what he knows of the business and affairs of plaintiff in error that he cannot possibly at the present time meet the necessary expense connected with the early hearing of this case, but that at the end of six months from the opening of this court he can provide for and pay the same.

SHUBAEL F. WHITE.

Subscribed and sworn to before me this 2d day of October, A. D. 1895.

THOMAS J. McKEON,

Notary Public St. Louis County, Minn.

[Notarial Seal.]

Subscribed and sworn to before me this 2d day of October, A. D. 1895.

THOMAS J. McKEON,

Notary Public St. Louis County, Minn.

[Notarial Seal.]

Office Supreme Court, U. S.
FILED
DEC 30 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court

OF THE

United States.

OCTOBER TERM, 1895.

NO. 694.

GEORGE W. POST,
Plaintiff in Error,

VS.

THE UNITED STATES.

BRIEF OF PLAINTIFF IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

S. F. WHITE,
Counsel of Plaintiff in Error.

J. L. THWING,
PRINTER AND BINDER,
DULUTH, MINN

Supreme Court

OF THE

United States.

OCTOBER TERM, A. D. 1895.

GEORGE W. POST,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

The plaintiff in error is accused of having committed the offenses of which he was convicted by the verdict of the jury, subornations of perjury, at Duluth, in the Fifth Division of the District of Minnesota, on the 4th day of February, 1894. The indictment was found at St. Paul, in the Third Division of said district, on the 20th of July, of the same year, at a session of the court commencing on the 26th of June of that year. The indictments were originally two in

number, No. 1717, containing two counts, charging plaintiff in error with suborning Sylvester Truesdell to commit perjury before the land officers of the United States Land Office at Duluth, in two separate affidavits and proofs made by said Truesdell in a pre-emption proof made by him as a pre-emption claimant, and the other, No. 1826, alleging subornation of the same witness before the same officers, on the same day, as a witness for William Rice, another pre-emption claimant. Between the time of the alleged commission of the offenses charged and the time of finding the indictments, Congress passed the Act, Chapter 132, of 28 Statutes at Large, directed to take effect upon its passage, approved July 12, 1894, whereby it is provided "that all criminal proceedings instituted for the trial of offenses against the laws of the United States arising in the District of Minnesota, shall be brought, had and prosecuted in the division of said district in which such offense was committed." Plaintiff in error demurred to these indictments separately for want of jurisdiction of the court to entertain the indictments, they being "brought" in a different district from that where the offenses were alleged to have been committed. These demurrers were overruled and the cases transferred to the Fifth Division for trial, where they were consolidated for trial. Upon such trial plaintiff in error was not found guilty of the offense

charged in the first count of the indictment No. 1717, but was found guilty of the offense charged in the second count of that indictment and of the offense charged in the other indictment. Upon the coming in of this verdict the plaintiff in error made a motion in arrest of judgement, the second ground of which, and the one which is relevant to this statement so far as yet made, is "that the court had no jurisdiction to try the defendant upon the said indictments." (Record folio 27). This motion was refused, whereupon plaintiff in error sued out and had allowed a writ of error to this court, the twelfth allegation of error upon which the same was allowed being: "The court below erred in refusing the motion of the defendant, after the rendition of the judgment in said cause, in arrest of judgment therein for the various causes and reasons set forth in said motion, on account of each and every of which said motion in arrest of judgment should have been granted" (Record folio 37).

The indictments will be seen from the record to be long, loose and rambling, as though they might have been drawn by the members of the grand jury without any assistance of a lawyer, and it will be noticed that the indictment No. 1717 nowhere alleges that Truesdell, who is alleged to have committed the offense of perjury, was sworn at the time of the commission thereof, and plaintiff in error urged this most strenuously

upon his motion in arrest of judgment under his allegations that the indictments charged no public offense and did not show that Truesdell was sworn; and the introduction of all the testimony in the case was against the objection and exception of the plaintiff in error.

The first count in indictment No. 1717 charged that plaintiff in error suborned and procured one Sylvester Truesdell "to subscribe his name and make oath to a certain written affidavit, declaration, certificate and testimony known as the testimony of a claimant in pre-emption proof." This testimony was set out at length and was the principal case as contested on the trial, and upon this count the jury found no verdict against the defendant, so that the errors of the court with reference to this count are not considered by us in this statement or argument.

The second count of the indictment accused the plaintiff in error of suborning and procuring said Truesdell to subscribe his name and make oath to an affidavit in the following words, required of him as a pre-emption claimant: "I have not settled upon and improved said land to sell the same on speculation but in good faith to appropriate it to my own exclusive use and benefit and that I have not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever by which the title which I may

acquire from the government of the United States shall inure in whole or in part to the benefit of any person except myself." The matters in which these allegations were alleged to be false are "that he, the said Sylvester Truesdell, had settled upon and improved said land, so far as the same had been settled upon or improved by him, to sell the same upon speculation, and not in good faith to appropriate it to his own exclusive use or benefit, and the said Sylvester Truesdell had theretofore made an agreement and contract with the said George W. Post by which the title which the said Truesdell might acquire from the government of the United States should inure to the benefit of said Post." (Record, page 6.) The testimony in the case bearing on this count is all set out in the bill of exceptions and will be found on examination to consist of the uncorroborated testimony of Truesdell, the alleged perjurer. He testified that the plaintiff in error hired him to take the claim as a pre-emption, agreed to pay his expenses and $50, as well as to pay the price of the land; that he went on and proved up the pre-emption, obtained his receipt therefor and made a deed, which he supposed was witnessed and acknowledged, of the land to plaintiff in error and delivered the same to him the same day that he proved up on the land; that, at the same time, he made a mortgage to plaintiff in error on the land, securing a promissory note for $300.

The witness was positive that all the papers made by him were executed at once (Record folio 45). The mortgage and note were introduced in evidence by the defendant, plaintiff in error. The note, except the signature, was in the handwriting of plaintiff in error, the mortgage was drawn and the acknowledgment to it taken by Col, Colville, who is a lawyer who was at the time partner with the plaintiff in error in their business as land office attorneys but not in any other business. He was sworn and examined as a witness and his testimony appears at page 29 of the Record. He testified as to his drawing the mortgage and took its acknowledgement, that there were no other papers executed at that time unless that note was executed by Truesdell to plaintiff in error; that there was no deed executed at that time; that they then occupied an office, one room, perhaps 13 by 14 feet, with two or three tables in it, one occupied by him, one by plaintiff in error, and he thought there was a third table occupied by another gentleman and that the distance between him and plaintiff in error was slight, probably five feet. On cross-examination the witness admitted that it was possible a deed might have been drafted at that time and he not have seen it. This was all the testimony bearing on this part of the case offered by either side, except the denial by plaintiff in error of all the testimony of the witness Truesdell.

The allegations of indictment No. 1826 as to the false affidavit of Truesdell made by the subornation and procurement of plaintiff in error are "that he, the said Sylvester Truesdell had known the said William Rice for five years; that said Rice settled on said claim November 15th, 1890; that his first act of settlement wos clearing and building a house; that he has upon the land the following improvements: a log house suitable for all seasons; a clearing of two acres and one root house; that he commenced his residence upon said land November 2nd, 1890; that he has cultivated the land and made it his home" (Record folio 13).

Truesdell's testimony as to this matter is found on page 31 of the same Record; the affidavit was shown him, he identified it and said that it was the statement that he swore to as witness in making final proof in the Rice claim. His testimony of what caused him to make this affidavit is, "The day before the final proof was made I went to Mr. Post's office and Rice was in there. I never seen him before. Post introduced him to me and said he would want me to go as witness for Mr. Rice, proof witness. He told me what to swear to. I did not know anything about Mr. Rice's claim, only I had been over it two or three times.' Q 'Just state whatPost told you to do.' A 'He told me to go and be witness in making final proof for Rice and I did so.' Q 'What, if any-

thing, did he say to you about the making of the final proofs and the answers?' A 'Well, it would be hard—' Q 'In general.' A 'To go and swear to such statement as would be necessary for Rice to make a good proof; he got me to go as proof witness. I had never seen the man before.' Q 'Did he or did he not state to you what it would be necessary in order to make the final proof for you to swear to?' A 'He told me some of the things it would be necessary for me to swear to. I do not remember the words.' Q 'Did he or did he not know at the time that you were not acquainted with Mr. Rice?' A 'He certainly must have, for he gave me an introduction to him.'" This, with the reading of the questions and the answers and the allegation of Truesdell that he answered and verified them and that they were at that time to his knowledge false was all the evidence of the witness Truesdell on that indictment. The only other testimony in the case bearing upon this question is that of William Craig, on page 34 of the Record, and is as follows: "He was in Post's office in November, 1893, when Post introduced him, and this conversation took place, Truesdell being present. 'Post introduced me to Rice and turned to Truesdell and said, 'I suppose you know Rice,' and Truesdell said he did; he didn't state he did; I think he said 'he ought to know, he had been a neighbor of his for years up there,' or something like that." Asked if there

was anything impressed the conversation on his mind, witness said: "Well he said that he didn't know, I suppose it was on account of his being a colored man, he knew there was some difference in color, but they were the same in politics.' Rice was colored. He remembered the matter because of that remark." Possibly it may be claimed, as it was below, that the testimony of the witness, Neilsen, on page 32 of the Record, in which this witness testifies that plaintiff in error said to him on one occasion, "that Rice was a fool and he had shipped him out of the country," bears upon this matter, but I cannot see that this bears in the least upon this question. The foregoing is all the testimony on this count, except the denial of Truesdell's testimony by plaintiff in error.

Plaintiff in error asked the court, upon the trial of the case, to charge the jury, folio 56 of the Record: "In this case you cannot find a verdict of guilty on the uncorroborated testimony of Truesdell, as he confesses himself a perjurer about the very matter in whfch the defendant is charged with crime, and unless Truesdell's testimony is so corroborated by other evidence as to convince you beyond a reasonable doubt that the defendant procured him to commit that perjury you must bring in a verdict of acquittal," which was refused by the court, and exception then and there duly taken by the plain-

tiff in error to the refusal. The court charged the exact converse instead, and refused several other requests of the plaintiff in error covering the same question and applying the same principle of law to the facts of this case, to which exception was duly taken.

ARGUMENT.

The question of jurisdiction of the court below, 12th assignment of error, found at folio 37 of the Record, repeated at folio 80 of the Record by the assignments in this court and further elaborated by the 13th and 14th assignments or error in this court, shown at folio 81 of the Record.

XII. The court below erred in refusing the motion of the defendant (plaintiff in error) after the rendition of the verdict in said cause in arrest of judgment therein for the various causes and reasons set forth in said motion on account of each and every of which said motion in arrest of judgment should have been granted.

XIII. The court below erred in overruling the demurrer of the plaintiff in error to said indictment No. 1717, and holding that the court had jurisdiction to try him on said indictment, notwithstanding his objection to its jurisdiction set out in said demurrer.

XIV. The court below erred in overruling the demurrer of the plaintiff in error to said in-

dictment No. 1826, and holding that the court had jurisdiction to try him on said indictment, notwithstanding his objection to its jurisdiction set out in said demurrer.

The portion of the motion in arrest of judgment upon which the plaintiff in error rested his claim before the court below, and depends in this court, so far as regards this branch of the case, is set forth in article II of his said motion, in folio 27 of the Record "That the court had no jurisdiction to try the defendant upon said indictments."

The demurrers to the indictment are set out on page 12 of the Record and show the objection to the jurisdiction of the court "that the grand jury which found and presented the said indictment did not have jurisdiction to enquire into or take cognizance of the matters and things set forth in the said indictment, in this, to-wit, that the offense in said indictment alleged to have been committed, as appears from the indictment, was committed in the Fifth Division of the said district of Minnesota, and the said indictment was found and presented at a term of this court, held in the City of St. Paul, in said district, and outside the limits of said Fifth Division." These separate demurrers to the separate indictments were overruled, and the defendant then pleaded, as he necessarily must, and has raised the same objection at every opportunity open to him since.

The statute cited by us in the statement of the case, in force when the indictments were found, July 20th, 1894, (pages 3 and 7 of the Record) at St. Paul in the Third Division of the district, for an offense alleged to have been committed at Duluth, in the Fifth Division of the same district, is explicit that all criminal proceedings instituted for the trial of offenses against the laws of the United States arising in that district shall be *brought* in the division of said district in which such offense was committed.

There can be no possible question that this was a criminal proceeding, that it was instituted for the trial of an offense, and that this was an offense against the laws of the United States. I do not see how there can be any question that the finding of an indictment is the "bringing" of an action for the trial of an offense. Suppose there were in the case a preliminary examination, although that does not appear from the Record, that is not the "bringing" of an action for the "trial" of the offense, but merely one for the preliminary examination of the alleged offender, to find whether or not the offense charged has been committed, and there is probable cause to believe the accused may have committed it, and if the examining officer finds these matters, he holds the accused so that he may not escape while proceedings are being instituted against him to bring him to "trial."

These matters are so fundamental that no authorities need be cited, and the finding of the indictment necessarily follows as the act by which, in this case, the criminal proceeding "instituted for the trial" of the offense of which the plaintiff in error was convicted in the case was "brought."

This court has only lately in the case of In Re Bonner, 151 U. S., 242, so clearly stated the law on the subject of the jurisdiction of courts to render a judgment in a criminal case, that I make no further argument on this question than to quote a few sentences from that decision: "In all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction, and to try the case, and to render judgment. It cannot pass beyond those limits, in any essential requirements, in either stage of these proceedings; and its authority in these particulars is not to be enlarged by any mere inferences from the law, or doubtful construction of its terms," "It is plain that such court has jurisdiction to render a particular judgment *only* when the offense charged is within the class of offenses placed by the law under its jurisdiction, and when, *in taking custody of the accused*, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the lim-

itations, prescribed by the law, castomary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void."

It was urged in the court below that as the alleged offense was committed before the law was passed, and the session of the court commenced before the law took effect, therefore the law did not apply to this indictment.

In the case of Caha vs. United States, 152 U. S., 211, this court, at least impliedly, holds that had the limitation upon the authority of the District Court of Kansas to try offenses committed in Oklahoma been, as contended by counsel of Caha, confined to all actions commenced in such courts before the passage of the act creating the Oklahoma court, the Kansas court would have had no authority to try the defendant, but you hold that the contention of Caha's counsel is not borne out by the terms of the law and that that statute left the Kansas court with jurisdiction to try all crimes committed in that territory before the passage of the act. In other words you decide the meaning of the law by its language, adding nothing to, subtracting nothing from its terms, and, applying the same rule to the act involved in this case, the court had no jurisdiction of the case in this case upon an indictment found after the passage of the law in the Third Division of the district for an offense alleged to have been

committed in the Fifth Division. There was no more jurisdiction in the court over that offense than there would have been had it have been alleged to have been committed in the state of Wisconsin. The time when the session of the court should have commenced or did commence cuts no figure in the case. The Record shows that the indictments were found after the law went into force and when its want of jurisdiction was called to the attention of the court it should have quashed the indictments and thereafter, upon motion in arrest of judgment, should certainly have set aside the verdict and all the proceedings in the case for lack of original jurisdiction over the same.

II.

The question of the sufficiency of the indictment.

ALLEGATIONS OF ERROR.

1. The court erred on the trial of said cause in admitting, against the objection and exception of defendant, any testimony under the second count of the indictment on the Truesdell claim, for the reason that said count does not charge against the defendant any public offense against the laws of the United States.

The twelfth assignment of error has already been printed by us in this brief, the denial of the motion in arrest of judgment made by the plaintiff in error.

The particular grounds of that motion applicable to this part of our argument are shown at page 18 of the printed Record and are, "I. That the indictments in said cause do not charge any public offense under the laws of the United States."

"III. That the indictments are inadequate in allegation as follows: a. They do not, nor does either of them, state with sufficient clearness and particularity the facts constituting the alleged perjury of Sylvester Truesdell."

"e. They do not show that said Truesdell was sworn."

The allegation of the second count of the indictment called in the bill of exceptions and on the trial below, "on the Truesdell claim," No. 1717, as to the perjury of Truesdell, appears in folio 8 of the Paper Book, and, after setting out the affidavit thereafter alleged to be false, is "that the said affidavit, declaration, certificate and testimony he, the said Sylvester Truesdell, then and there subscribed and swore to before A. J. Taylor, the register of the United States land office at Duluth," but it is nowhere alleged in this indictment that Truesdell "was sworn."

The case of United States vs. McConaughy, 33 Fed. R., 168, is a case where the indictment was much better than in this case but was held bad by Judge Deady, who says: "After stating

the pendency of the proceeding before the register and receiver, the indictment alleges that the defendant offered himself as a witness therein on his own behalf, and 'did subscribe his name to a deposition in the words and figures following:' (Here follows the deposition, with a certificate of the receiver thereto that the same was subscribed and sworn to before me this nineteenth day of August, 1885.) The indictment then al leges that the defendant did in said proceeding wilfully and corruply 'depose and swear' that the answers which he had made to the questions in said deposition contained were, to the best of his knowledge and belief, true; that the 'said oath' in said proceeding, 'taken as aforesaid' by said defendant, 'was then and there duly administered' to him by said register and receiver.

In an indictment for perjury it must be directly stated in some form of apt words that the defendant was sworn. It is not sufficient that it so appears by inference or argument (1 Whart. Crim. Law, Par. 1287; 2 Bish. Crim. Proc., Par. 912; State vs. Divoll, 44 N. H. 142). The indictment in this case only alleges that the defendant 'did depose and swear.' All that is subsequently said about 'said oath,' and the taking and administering of the same, refers to the allegation 'did depose and swear,' and adds nothing to its signification or effect. The case in this respect is nearly on all fours with that of U. S. vs. Hearing,

11 Sawy., 521. In that case the defendant was indicted for perjury in making a homestead affidavit which was set out in the indictment. This was followed by an allegation that the defendant did, before a person authorized to administer 'said oath,' depose and state contrary to his *said oath*. In sustaining a demurrer to the indictment, the court said that after setting out the affidavit there should have been an allegation 'that the defendant, being then and there duly sworn by the clerk,' etc., 'did depose and state that said affidavit was true;' and that the allegation that the defendant did depose and say and state contrary to his said oath is, if anything, an attempt to assign perjury on 'said oath' or supposed oath, the administration of which is nowhere alleged. But the fact that the defendant was sworn must be distinctly stated. It is not sufficient that it appears by implication.

In this case it is true that the indictment states that the defendant did 'depose and swear,' as in the deposition already set forth. But this is by no means the equivalent of the sufficient allegation, 'being duly sworn, did depose and say.' To 'depose' is merely to state or affirm some matter of fact in an affidavit or deposition. And this may be done as well before an oath is administered to the deponent as afterwards. In this case it appears that it was administered to the witness after he had deposed.

One may 'swear' who is not 'duly sworn.' In one case the oath, so to speak is self-imposed, and the swearer incurs no legal liability thereby, while in the other the oath is administered by a person having authority to do so, and the affiiant takes it subject to the pain and penalties for perjury."

In State vs. Divoll, cited by Judge Deady the court, standing so high as that deservedly does, says in a carefully considered opinion, "The oath, the statement, its materiality, and its falsehood, are the vital things to be alleged in an indictment like this. That the party was sworn must be alleged distinctly and positively. It is not enough to state it argumentatively, or to make such a statement as by inference implies that a party was sworn, however strong the implication may be." The same rule of course holds good in an indcitment for subornation of perjury, that the offense of perjury by the suborned must be good or the allegation against the suborner falls to the ground. In subornation of perjury the same rules apply and the same allegations are necessary as in perjury. Whart. Crim. Law, Par. 2271.

Commonwealth vs. Smith, 11 Allen, 243.

United States vs. Robinson, 23 Northwestern, 90.

Neither of the indictments show that any proceedings were pending before the Register or the officers of the United States land office authorizing the administering of the oaths to

you are satisfied beyond a reasonable doubt of that fact, the evidence of Truesdell would be sufficient under the law to establish the fact under the rule I have given you that the defendant was guilty of subornation of perjury. Truesdell is not in the position of an accomplice, and even if he were, according to the law which is to be enforced in this court, the testimony of an accomplice uncorroborated is sufficient, for, although we have in this state a law which says that no person shall be convicted on the uncorroborated testimony of an accomplice, that has no application in the federal courts;" which said charge was the exact converse and opposite of the charge requested by the plaintiff in error and refused by the court; to which (the refusal) he did then and there duly except.

The request of plaintiff in error is set out at length with the refusal and exception at folio 57 of the Record, and the charge of the court in which he charged the exact converse of the request is to be found at folio 62 of the Record. The difference in our position and that of the court is perhaps more clearly marked in the succeeding paragraph of the charge, where he leaves it to them as a matter of fact to decide whether or not they need corroborative evidence to support the testimony of Truesdell, instead of charging them as a matter of *law*, as we insist he should have done, that they could not convict on his tes-

timony unless it was corroborated. The question is not one of principal and accomplice, as the trial judge seems, from his charge, to have thought, and depends upon no statute but upon fundamental principles underlying the very foundations of justice and judicial proceedings involving the liberty of men, charged with the commission of crime upon the oaths of men so abandoned as a perjurer.

The statement of the posstion and condition of the witness Truesdell seems to carry conviction to any unprejudiced mind without further argument of the correctness of our position on this question. Truesdell by his confession committed the offense of perjury. The plaintiff in error could not be guilty unless Truesdell was guilty of perjury. Had he pleaded to an indictment for the offense of which he admitted he was guilty and judgment been pronounced in his case, he would have been judicially declared so infamous that not even a pardon by the President of the United States would have permitted his mouth thereafter to be opened to testify on any subject in a court of the United States. Without the judgment being rendered he is *actually* as infamous as he could have been were the judgment rendered, upon such an infamous wretch it needs no imagination to picture what the pressure of the temptation to escape punishment and transfer the legal infamy to another is of the

promise, if not actually given in so many words, implied in using him as a witness against another, to lead him to testify that such other instigated him to commit the offense, and certainly in such a case the one accused of such subornation is entitled to the protection from the law that he shall not be convicted on the uncorroborated testimony of the perjurer.

The case of People vs. Evans 40 N. Y. 1, is almost on all fours with this. The differences are that in the one case, according to the evidence of the perjured witness, the price to be paid was $25 and only $5 was paid and in the other the price to be paid was $50 and only $20 was paid. In that case the court says: "The court charged the jury that it was competent for them to convict the defendant upon the uncorroborated and unsupported testimony of Near, and refused to charge, on the request of defendant's counsel, that if the evidence of Near is not corroborated, then the jury ought not to convict the defendant upon the unsupported evidence of Near, and to each of these rulings the defendant's counsel excepted.

This charge cannot be supported upon principle or authority, when applied to a case like the present. This witness now swears that he swore false and committed the crime of perjury, in regard to this same matter, for the paltry bribe of $25, which he says the defendant agreed to

pay him for swearing to it. He affirms, in short, that he committed perjury in regard to this very matter for a bribe of $25, and it is now claimed that he is entitled to be believed, when he swears he swore falsely before upon this matter, and when he swears the defendant suborned him to do so. The general rule is, that where a man is convicted of an offense which is inconsistent with the common principles of honesty and humanity, the law considers his oath to be of no weight, and excludes his testimony as of too doubtful and suspicious a nature to be admitted in a court of justice, to affect the property or liberty of others (1 Stark. Ev., 94); and whenever the witness has been convicted of perjury he is excluded from testifying, and our statute, like the 5 Eliz., chap. 9, sec. 6, provides that a person convicted of perjury 'shall not thereafter be received as a witness to be sworn in any matter or cause whatsoever, until the judgment against him be reversed'; and it is held, both under our statute and the statute of Elizabeth, that a pardon which purports to restore a person convicted of perjury to all his civil rights will not make him a competent witness (citing cases, last Holdridge vs. Gillespie). In this latter case, Chancellor Kent excluded the deposition of a witness who had been convicted of perjury, although he had been pardoned by the Governor. The statute declares him incompetent until the judgment shall be reversed. This imposition of the statute on conviction for

perjury in addition to the severe punishment prescribed was not imposed so much by way of punishment to the party as it was to prohibit the courts from receiving the oath of a person convicted of disregarding its obligation, and to save others from the peril of the testimony of persons, who have proved themselves regardless of the obligations of an oath. The reason of this rule applies with force to the case at bar. Under this charge, Near is permitted to be a witness to establish the fact, that he, himself committed perjury on the trial of Rose, and his evidence alone, unsupported by any other testimony, is held sufficient to justify the conviction of the defendant of the high crime of subornation of perjury. The fact must be proved on the trial of the defendant, that Near committed perjury on the trial of Rose, and Near swears to it, and that is said in law to prove it, if the jury believe him The fact must be proved against the defendant, that the defendant suborned Near to commit the perjury. Near swears that the defendant hired him to commit the perjury, and agreed to pay him $25 for doing it, and when he got through and performed his agreement, he would only pay him $5, and this is held to be sufficient proof in law of the fact, if the jury will only believe him. The jury, by their verdict, say they believe him, and convict this defendant. Now, what is involved in such a verdict? The jury must, by their verdict, convict Near of per-

jury, for this is the very question to be tried; and after they have done that, to place their verdict of the defundant's guilt, in suborning him, upon the sole uncorroborated evidence of this perjured witness, who, for the paltry sum of $25, would swear to an alibi to save a guilty burglar and thief from the just punishment due to his crimes.

I am aware of the rule that no person is deemed so infamous in law, that he shall be excluded by the court from being sworn as a witness, until he has been legally convicted of an infamous crime, and judgment has been passed against him.

The question is whether, under every and all circumstances, the court is justified in leaving the credibility of the witness unconditionally to the jury; if so the citizen has no security in the law, that an issue involving his personal liberty shall not be decided against him without the testimony of, at least, one credible witness, as the case at bar fully illustrates. The general rule is certainly well established, that a prisoner may be convicted upon the sole uncorroborated testimony of an accomplice, and, as a general rule, the question of the credibility of the witness belongs to the jury. (Citing cases and authorities.) This rule can hardly exist in every case, consistent with another rule of evidence, which has become a maxim of the law of evidence. It is a rule for the control and guidance of the jury, and which is, that

if the jury find the witness has sworn corruptly false in one material thing, they shall pronounce him false in his whole testimony, and utterly disregard it. The maxim of the law in this respect is, '*falsus in uno: falsus in omnibus;*' false in one thing, false in all things. (Citing cases.) And it was said by Cowen, Justice, in one case, that *falsus in uno; falsus in omnibus* is a maxim which does not stop at *nisi prius*. Now, how does this principle apply to the case at bar? The jury must find from Near's own testimony, before they can convict the defendant, that he, Near, has corruptly committed perjury. Applying the principle, that if the testimony of the witness be corruptly false in one thing, the whole must be rejected, I do not see how the charge in this case can be sustained. (Citing authorities.) The case of Dunlap & Meiggs vs. Patterson, 5 Cow. R., 243, is in point, and holds, that when it is plain that the witness has perjured himself, either in the cause pending or in a former suit, relating to the same matter, that the jury should have been instructed to disregard the testimony of such witness, and that the court erred in refusing so to instruct them, and instructing them that the credibility belonged to them, and a new trial was granted. I am of opinion, that in the case at bar, the judge should have advised the jury, that if they found Near uncorroborated, they should acquit the defendant.

There must be some exceptions to all general rules, and I would make this case an exception to the general rule, that a prisoner may be convicted on the uncorroborated testimony of an accomplice. In England, whatever once may have been the law, the settled and humane rule now is, to use the language of Serjeant Talfourd, for the judges, in the exercise of a sound descretion, to direct the acquittal of a prisoner, unless the accomplice be corroborated by evidence admitting of no suspicion (Wharton Cr. Law, 302); but I do not propose to interfere with the general rule, that the prisoner may be convicted on the unsupported and uncorroborated testimony of an accomplice, but to make this case an exception to the rule. It seems quite necessary to do so to save the rule itself from reproach, and the admistration of public justice from disgrace. The charge of the judge, in a case like this, is, in effect, just this: The corpus delicti is, that Near was suborned by some one to commit perjury on the trial of Rose, and that he did commit the perjury, and this must be first established. The next question in the case is, is the defendant, Evans, the person who suborned Near to commit the perjury? Near swears he was suborned to commit the perjury, and that he did it, and that Evans procured and hired him to do it. The case is thus submitted, and the jury are told by the judge, that they may convict Evans on the sole uncorroborated evidence of Near alone. Now,

what is the verdict of the jury in this case, fairly and justly stated? First. We find that this witness, Near, was hired for $25 to swear to an alibi, and commit wilful and corrupt perjury, to save a proved guilty burglar and thief from the just punishment of his crimes, and that he did thus swear and commit perjury. This we find as the corpus delicti in this case, and we find this on Near's own evidence alone, because he swears to it. Secondly. We find that Evans, the defendant in this case, is guilty of hiring and suborning the said Near to commit such perjury, and we find this on the sole and uncorroborated testimony of Near, because he has sworn to it. We find, in short, first, that Near has been hired to commit willful and corrupt perjury on the trial of Rose, and did commit willful and corrupt perjury to save a burglar and thief from just punishment. Second, we find Near is a credible and reliable witness, and will convict the defendant of this high crime on his evidence alone. No jury should ever have the opportunity given them by any court to render so disgraceful a verdict in a court of justice, as this. The jury are required literally to stultify themselves."

In United States vs. Hall, 44 Fed. Rep., 864, Judge Speer says: "In all trials for perjury it is a rule of evidence, founded upon obvious reasons, that the testimony of a single witness is not sufficient to convict. There must be corroboration

of his evidence in some material particular, either by the testimony of another witness or other witnesses, or by other evidence of a documentary or circumstantial character, which possesses a sufficient corroborative effect. This rule is founded on substantial justice, because, if the testimony of the prisoner upon which perjury is assigned were opposed by the testimony of a single witness, it would be merely oath against oath." If this be true in the case of a credible witness, much more must it be true in one degraded and a perjurer by his own confession. There can be no difference in the rules applicable to perjury and subornation of the same, and we think that under the authorities, as well as upon principle, there can be no doubt of the error of the trial court in refusing to charge the jury on the subject of corroboration, as asked by the plaintiff in error, and most strenuously contended for by him on the trial, with the same reasoning and the same authorities as are now urged before this court.

So far as the decision of the case is concerned, our brief might end here, but another trial must be had on reversal, either on the same indictments if our objection as to the jurisdiction of the trial court is not well taken, or upon a new indictment that may be had, if it is well taken. In view of that fact we ask the court to decide the case upon the question urged by us in several

requests, that there was no evidence in the case corroborative of the testimony of Truesdell of the guilt of the defendant of the offenses of which the defendant was found guilty, so that the court should have directed his acquittal as asked by the defendant on the trial.

ASSIGNMENTS OF ERROR.

VIII. The court erred upon the trial of the cause in refusing to charge the jury as requested by the defendant (plaintiff in error): "There is no corroboration of Truesdell's testimony in the case, and you are therefore directed to bring in a verdict of not guilty," to which refusal to charge the jury as requested, the defendant (plaintiff in error) did then and there duly except. Record folios 35, 79 and 57.

X. The court erred upon the trial of said cause in refusing to charge the jury, as requested by the defendant, (plaintiff in error): "You are directed to find in favor of the defendant in this case with regard to the Rice claim for the two reasons:

1. That the testimony of Truesdell with regard to his alleged solicitation to commit perjury by the defendant is too vague and indefinite to sustain a conviction on that indictment.

2. That Truesdell's testimony as to this case is entirely uncorroborated;" which refusal to

charge the jury as requested was then and there duly excepted to by the defendant (plaintiff in error.) Record, folios 36, 80 and 57.

All the testimony bearing in any manner upon the guilt or innocence of the plaintiff in error of the offenses of which he was found guilty by the verdict of the jury is set out in the statement of the case by me in this brief. There was a large amount of other testimony in the case of the other offense of the same character, of which the defendant being charged was acquitted, and the court, in settling the bill of exceptions incorporated, on the motion of the government's counsel, all the testimony given tending to corroborate the testimony of Truesdell with reference to the allegations of that offense and certifies at folio 55 of the Record, "There was other testimony given on the trial of the case in reference to the charge contained in the first count of the indictment with reference to the Truesdell claim, but the foregoing is a statement of all the testimony given upon the trial of the cause that has any reference to the second count of the indictment with reference to the Truesdell claim or to the indictment with reference to the Rice claim, and also of all the testimony given on the trial of said cause tending in any manner to corroborate the testimony of the witness Truesdell with reference to any of the counts of either indictment." At folio 26 of the case it is explained that on the

trial and in the bill of exceptions for convenience, indictment No. 1717 is called the indictment in the Truesdell case and the other in the Rice case.

The allegations of the false testimony in the first count of the indictment as to the Truesdell claim were as to whether or not Truesdell had made settlement upon his pre-emption claim November 17th, 1890, or at any time prior to the summer of 1893, had made the improvements described by him in his pre-emption proof, had established his home there and made it his residence, if the falsity of these allegations were known to defendant and he instigated Truesdell to swear to them. It was shown by the testimony that defendant was a land explorer, familiar with the vast forest of government land in that part of the state, getting the minutes thereof, locating men thereon, building or helping the settlers build their cabins and start their improvements, when one settler becoming tired of the attempt should give it up, concealing this fact from another intending or claimed settler, until he could secure something from such claimant for securing the withdrawal of the settler before located, attending to the making of proofs and the contests that might arise in the land departments, some or all of the business entirely legitimate, some involving overreaching of the settlers or claimants and

concealment of facts which if known to the settlers would prevent the locators receiving the fees which they actually did receive from those located by them. The evidence given to corroborate Truesdell's testimony as to this matter was that defendant in 1891, was on the land; that in that year he located one Lefleur on the land; he testified that at that time Truesdell was not there, at least to his knowledge; that he paid $25, in services in the land office, to one witness for the shanty on the land, although as to that defendant testified that those services were rendered without charge for an entirely different reason, having nothing to do with the shanty, that there had been another shanty on the land in question which had been burned, that the employees of defendant had at his direction done some little work fixing up the shanties on the Rice and Truesdell as well as other claims in the vicinity and that Truesdell had not been in the region until after the date of his claimed settlement. This testimony might perhaps corroborate the testimony of Truesdell on his testimony as to the first count as to his claim, but notwithstanding all this the jury disbelieved the witness as to this and found one of three things, either that Truesdell made the settlement as averred by him in his pre-emption proof and denied on the stand, that, if he did not, he told the defendant such a story that he believed it, believed that he had initiated

a settlement there, as he claimed, November 17th, 1890, in the burned shanty, and was glad to get an agreement from Truesdell, secured by mortgage on the land, for $150, to get Lefleur to withdraw his claim and opposition, or that he had nothing to do with instigating or procuring Truesdell to testify to what he did testify to in making the proof. That is, as to this corroborative evidence, the jury did not believe that which it corroborated, that which it did corroborate was false, but as it tended to show that this false statement was true, therefore it corroborates another statement made by the same witness, which the jury found was true. This is a novel application of the doctrine of corroboration. Where the truthful statements of an accomplice, in tribunals where such testimony is not permitted by the local law, upon collateral questions not at issue has been introduced, the courts of last resort are at one in condemning the introduction of such testimony, but I have found no case before in which the unique claim was made that corroborative evidence of the false statement of a witness tends to establish the truthfulness of some other statement made by him. If novelty is excellent in the law, here is superlative excellency on the part of the district attorney. On the question of what is corroborative evidence, I venture to cite a few authorities.

At the time of the decision of People vs. Evans, cited by me, a man accused of crime might, in New York, as now in the federal courts, be convicted on the testimony of an accomplice, uncorroborated, so far as the statute was concerned, the offense in this case being an exception from its very nature, but in 1882, chap. 30 of the laws of that year, the law of that state was changed, and a statute passed forbidding conviction in any case on the uncorroborated testimony of an accomplice, so that I am able to find a decision of the court of appeals of that state on the question as well as those of courts of less weight.

In the People vs. Hoogenkerk, 96 N.Y. 149, 162, the court says, "It is plain that, independently of the statutory rule, corroborative evidence, to have any value, must be evidence from an independent source of some material fact tending to show not only that the crime has been committed but that the defendant was implicated in it, and such is the doctrine of the best considered cases."

In Watson vs. the Commonwealth, 95 Pa., St. 418, 424, the court says: "It is almost the universal opinion that the testimony of the accomplice should be corroborated as to the person of the prisoner against whom he speaks. Some fact should be proved by testimony, independent of the accomplice, which, taken by itself, leads to the inference, not only that a crime has been

committed, but that the prisoner is implicated in it. To prove that the accomplice has told the truth in relation to irrelevant and immaterial matters which were known to everybody would have no tendency to confirm his testimony involving the guilt of the party on trial."

In Coleman vs. the State, 44 Texas, 109, the Supreme Court of that state says: "To allow convictions to stand where the corroboration is only in immaterial matters, would be to violate both the letter and spirit of the statute, and to disregard those precautionary rules which experienced and wise jurists have deemed it necessary to adopt in order to guard against erroneous convictions based on evidence unreliable because coming from a corrupt source."

In the people vs. Courtney, 28 Hun., 589, there is an extensive discussion of the question of corroborative testimony, in which the case of Coleman vs. the State and many others are cited and the court decided that the fact that the defendant was seen frequently before and immediately after the commission of the forgery of which he was found guilty and on some of the occasions under suspicious circumstances was not corroborative of the testimony of the accomplice as to the guilt of the defendant.

In Georgia, the Code, section 3755 provides, "The testimony of a single witness is generally sufficient to establish a fact. Exceptions to this

rule are made in specified cases, such as to convict of treason or perjury—in any case of felony, where the only witness is an accomplice, and to rebut a responsive statement in an answer in equity; in these cases, except in treason, corroborating circumstances may dispense with another witness."

Under that statute, which is the same as the rule of law applicable, without a statute to the offense with which the defendant in this case is charged, the Supreme Court of that state held and said in Childers vs. the State, 52 Ga., 106: "That in a case of felony where the only witness implicating the prisoner in the crime was himself avowedly guilty, the corroborating circumstances necessary to dispense with another witness must be such as to connect the prisoner with the offense, and that it is not sufficient that the witness is corroborated as to the time, place and circumstances of the transaction, if there be nothing to show any connection of the prisoner therewith."

In the same case the court say, after calling attention to the words of the code, "It seems to me that it is difficult to read this language without coming to the conclusion that more is intended than that the one witness, the accomplice, shall tell a reasonable story; that he shall show that he knew a crime was committed, and tell truthfully the

time, place and manner of it, as they are known perhaps to half the community, by the story of the person wronged, or by the traces which almost every crime leaves behind. As I have said, it seems to me, these words of our law mean something more than this, and that their language can only be met by requiring proof from other witnesses of facts going to show that the persons on trial, whose guilt is the only fact to be established, are implicated in the crime. Nothing else is *any* corroboration of the fact in dispute. Nobody denies the guilt of the witness; that fact needs no corroboration. He goes upon the stand avowing that the whole point of the case is the guilt of the persons on trial, and nothing which does not tend to confirm his story as to them can be fairly spoken of as corroborating the evidence he gives as to the fact to be established."

The Georgia Supreme Court again passed upon the same statute in McCalla vs. the State, 66 Ga., 346, where the court say: "In the case at bar the court charged the jury on the subject of that corroboration which the law demands to sustain the testimony of an accomplice in order to convict. 'You will look to the evidence and see if the facts, outside of his, the accomplice's, testimony, and without it are sufficient to cast on him, defendant, a grave suspicion of guilty knowledge in the matter. If so, and that sus-

picion be not proved away, then the testimony of the accomplice would be corroborated.' In this charge we are constrained to believe there was error in the rule of law laid down by the court against the defendant. Will mere facts outside of the accomplice's testimony that excite a grave suspicion in the mind of the jury furnish that corroboration that the law demands before a conviction can be had? We think not. Suspicion is defined by a standard lexicographer to be 'the act of suspecting, or the state of being suspected, imagination, generally of something ill, distrust, mistrust, doubt.' Could it be said that facts that excite a grave distrust, mistrust, or doubt, would corroborate an accomplice's testimony? It is difficult to lay down any fixed or definite rule as to what facts would be sufficient corroboration, so very varying are the facts and circumstances that arise in human testimony.

The corroboration required to validate the testimony of an alleged accomplice should be to the person of the accused, and tending to show his guilt; not a mere suspicion of his guilt, whether grave or light. The human mind is so constructed that where one is indicted for a grave offense the mere charge itself will excite a suspicion of guilt. Involuntarily it springs into action, and we look upon such a one with 'disrust and doubt.' To hold that when the facts proved make these suspicions grave they should warrant

a conviction with the otherwise uncorroborated testimony of an accomplice, would be an unsafe rule, and one we think not warranted by law. The wiser and more humane rule we think would be for the judge to tell the jury that if the accomplice be uncorroborated as to the person of the accused they must acquit. In other words, the rule as we understand it is, 'There should be some fact deposed to independently altogether of the evidence of the accomplice which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it.' Ros. Crim. Ev., 122. With this view of the law are forced to conclude the charge excepted to was error and prejudicial to the rights of the accused."

In people vs. Koening, 99 Cal., 574, the defendant was bartender in place of the regular bartender at the saloon of one Klein. He and Sarah Brady were acquainted and lived together for more or less for a year or two. One Gilmer was at the saloon drinking with the Brady woman and both finally went to bed together in a room off the saloon and spent the night there. The Brady woman stole about $80 from the man Gilmer and testified that she gave it the next morning to the defendant, who had the night before advised her to work some money out of Gilmer and had said, "If you don't get that money you are no good." The woman was arrested and

put in jail and while she was there the defendant went up to see her but was refused admission and told the sheriff "that he had arrested the wrong woman." "That he did not know or have anything to do with her." Conviction was had, appeal taken, and the action of the lower court was reversed on the ground that this testimony was no corroboration of the testimony of the testimony of the Brady woman, and the court say: "This testimony was not sufficient to warrant conviction. Sarah Brady was, confessedly, the perpetrator of the felony. The testimony as to defendant's complicity all came from her. 'A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which, in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.' Pen. Code, Sec. 1111. No inference of the guilt of the defendant can be drawn from the fact that he was at the saloon on the evening of the commission of the crime, beyond the fact that it gave him an opportunity to advise its commission. His business called him there, and his presence was not a suspicious circumstance. His inquiry at the sheriff's office is not regarded of sufficient importance to warrant a conviction. At most, it could only raise a bare suspicion, and

falls short of such corroboration as can be safely relied upon to support a conviction. People vs. Ames, 39 Cal., 403. People vs. Thompson, 50 Cal., 480. It is the peculiar province of the jury to weigh the evidence and determine the credibility of witnesses, and this court will not, in a case of a substantial conflict in the evidence, disturb the verdict of the jury. So, in case of the corroboration of an accomplice, if there is any substantial evidence in support of a satisfactory case made by the accomplice, the court will not trench upon the province of the jury by reversing its action. In the present instance, however, the figment of evidence in support of the testimony of the accomplice does not rise to the dignity of corroboration, and the judgment and order appealed from should be reversed and a new trial ordered."

The Texas statute requiring corroboration of the testimony of an accomplice was passed upon by the Court of Criminal Appeals in the case of Buchannan vs. the State, 24 S. W., 895, where the court says: "Conviction for burglary. We have read with great care the Record in this case, and do not believe that it supports the conviction. We are not at liberty to permit the conviction stand as a precedent. The witness Hughes is a confessed burglar and thief. Every fact relied upon by the State as corroborative, is explained, and made to consist with the innocence of the appellant, except one, namely: Appellant stated,

when his house was searched, that Hughes had nothing in the house, when in fact he had some of the stolen goods in the house."

In Conway vs. the State, 26 S. W. 401, the Texas Court of Criminal Appeals say: "To be corroborative, the evidence from other witnesses must tend to connect the defendant with the crime. In that case the conviction was reversed because the corroboration of the accomplice was upon immaterial matters and the defendant requested the court to charge the jury that corroboration of the accomplice as to those immaterial matters was not sufficient and its refusal so to do was the cause of the reversal of the action of the trial court.

In Commonwealth vs. Holmes, 127 Mass., 424, there is a long and able discussion of the corroborative testimony, in which, on page 438, the court says that an earlier decision has established this principle which they again enunciate: "That no evidence for such corroboration (that of an accomplice) can be legally admitted as competent and sufficient which does not tend to confirm the testimony of the accomplice upon a point material to the issue, in the sense that it tends to prove the guilt of the defendant."

NO TESTIMONY CAN BE CONSIDERED AS CORROBORATIVE OF THE TESTIMONY OF AN ACCOMPLICE, WHICH IS AS CON-

SISTENT WITH HIS INNOCENCE AS WITH HIS GUILT.

This principle finds a good example in the late case of McNeally vs. the State, Wyoming, 36 Pac. 824. In that case the defendant was convicted of felomously killing a cow belonging to another man and converting the meat to his own use, the testimony was largely that of an accomplice who assisted him, as he testified in killing the animal and hiding the hide and brands marking the animal near the defendant's house. The state showed that the accomplice guided the officers to the place where he said he and the defendant had hidden the hide and brands, and the officers there found them. The court below charged that this fact, if found by the jury, was strong corroboration of the truth of the accomplice's statement, and, although there was plenty more of corroborative testimony, they reversed the case for this error. The upper court said that this testimony was not a corroboration at all, as it "did not tend to connect the defendant with the crime charged against him." As the court says in the same case: "Such corroboration, to be competent and sufficient, must tend to confirm the testimony of the accomplice upon a point material to the issue, in the sense that it tends to prove the guilt of the defendant."

ASSIGNMENT OF ERROR.

V. The court below erred in refusing to charge the jury as requested by the defendant, (plaintiff in error): "If you should find, under the instructions given you by the court, that the government has proved that Truesdell committed perjury upon the occasion charged in the indictments, it is not sufficient that the defendant had good reason to believe or even that he knew that Truesdell in giving this testimony, was swearing to a falsehood. However great may be the moral obliquity of an attorney who continues to conduct a case in which he knows or has good reason to believe that his client is testifying to a falsehood, he does not thereby become guilty of the offense charged against the defendant," to which refusal to charge as requested, the defendant (plaintiff in error) did then and there duly except.

The defendant claimed that all the connection he had with the case, except the loaning the money to purchase the land from the government and pay for getting the Lefleur claim out of the way in the Truesdell case was as his attorney before the land office, and he was entitled to have the attention of the jury directed to his claim to have the jury instructed as to the law applicable to that theory of the case and that was all that was sought in this charge and was therefore applicable to the case. It needs no argument to

show that the charge as asked is good law. By refusing it when asked in the presence of the jury, the court practically said to them that an attorney by continuing to prosecute a case in which he knows or, even, has good reason to believe that his client is testifying to a falsehood is guilty of subornation of his perjury, if one he commits.

ASSIGNMENT OF ERROR.

IX. The court below erred upon the trial of said cause in refusing to charge the jury as requested by the defendant (plaintiff in error): "If you find, as the witness Craig testified, that instead of the defendant introducing Rice and Truesdell the day they made their final proofs, as Truesdell testified, the defendant at or shortly before that time introduced Rice and Craig, and upon inquiry by him, was told by Truesdell that he and Rice had been neighbors for several years, you must acquit the defendant upon the indictment with reference to the Rice claim, unless you find that Truesdell was making an untruthful statement in so stating to him;" to which refusal of the court to charge the jury as requested by him, the defendant (plaintiff in error), did then and there duly except. Record folios 35, 57 and 79.

In this same connection I will consider the request made and refused for the court to direct an acquittal on that indictment for one reason

that Truesdell's testimony was too vague and indefinite to support a conviction. That testimony is very brief, is set out on page 31 of the Record and amounts to this, Post introduced him and Rice at his office the day of the proofs at the land office and told Truesdell "to go and swear to such statement as would be necessary for Rice to make a good proof; he got me to go as proof witness. I had never seen the man before." When asked if defendant knew they were not acquainted the witness answered, "He certainly must have, for he gave me an introduction to him." This statement of the witness therefore was the keynote to this alleged offense, and, if the testimony of Craig was true, the case as to that charge must fall to the ground. Under those circumstances the defendant was clearly entitled to have the attention of the jury specifically called to this vital point of the case and the testimony of the witness Craig, and for the error in that respect, if there were no other, the case should be reversed and remanded for another trial.

S. F. WHITE,
Attorney and of Counsel of Plaintiff in Error.

MAR 5 1896
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE W. POST,
PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

No. 694.

In Error to the District Court of the United States for the District of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES K. REDINGTON,
Attorney for Plaintiff in Error.

S. F. WHITE,
of Counsel.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1896.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE W. POST,
PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

No. 694.

Brief for Plaintiff in Error.

As mere matter of convenience at the argument the following is submitted as a brief summary of the matters already fully and exhaustively called to the attention of the court in the brief for plaintiff in error filed by Mr. S. F. White. The case is submitted upon the brief of my associate, topically epitomized in the following:

STATEMENT.

The case at bar is indictment of the plaintiff in error, in the district court of the United States for the district of Minnesota, for alleged subornation of perjury under the laws of the United States (Revised Statutes, secs. 5392

and 5393). Trial, conviction, and sentence resulting, the accused applied to the trial court for writ of error, which was allowed, and the case thus reaches this court for review upon bill of exceptions settled by the court below. (Record, pp. 20, 21, 25 to 43, and 1 to 3.)

The State of Minnesota is a judicial district of the United States (R. S. U. S., sec. 531) and is divided by law into six divisions. The third division of said district is composed of the counties of Chicago, Washington, Ramsey, Dakota, Goodhue, Rice, and Scott, and the courts of said division are by law directed to be held at St. Paul, in said State. The fifth division of said district is composed of the counties of Cook, Lake, St. Louis, Itasca, Cass, Crow Wing, Aitkin, Carlton, Pine, Kanabac, Mille Lacs, Morrison, and Benton, and the courts thereof are directed by law to be held at Duluth, in said State. Each of said divisions has a grand and petit jury for each of its terms.

Act of April 26, 1890, 26 Stat. 72, secs. 1, 6.

July 12, 1894 (28 Stat. 102), Congress passed an act in the following words:

"That all criminal proceedings instituted for the trial of offences against the laws of the United States, arising in the district of Minnesota, shall be brought, had, and prosecuted in the division of said district in which such offences were committed.

"SEC. 2. That this act shall take effect upon its passage."

July 20, 1894, eight days subsequently to the passage of the act of Congress above quoted, in the *third* division of said district, at the June term of the district court for said division, held at St. Paul, in said third division, the grand jury found two indictments against plaintiff in error. The offences charged are alleged to have been committed

at Duluth, which is within the *fifth* division of said district. These indictments were as follows:

Indictment No. 1717 (Record, pp. 3 to 7), containing two counts, charging:

First count. Subornation of one Sylvester Truesdell in respect to the certain "affidavit, declaration, certificate, and testimony" of said Truesdell alleged to have been made or given February 3, 1894, before the register of the United States land office at Duluth, Minnesota, in support of a claim of said Truesdell to certain lands under the pre-emption laws of the United States, and relating to his claimed settlement and residence upon and improvement of said premises.

Second count. Subornation of said Truesdell in respect to his certain "affidavit, certificate, declaration, and testimony alleged to have been made or given February 3, 1894, in said above-mentioned matter, before said register at Duluth, to the effect that he (Truesdell) had settled and improved said land for his own exclusive use and benefit and that he had made no contract by which his title might inure to the benefit of any other person than himself.

Indictment No. 1826 (Record, pp. 7 to 9), containing one count and charging subornation of said Truesdell in respect to his "certain oath, affidavit, certificate, and testimony" made or given before the said register at Duluth in support of the claim of one William Rice to certain lands under the pre-emption laws of the United States.

Immediately upon the filing of these indictments, to wit, July 20, 1894, the plaintiff in error pleaded not guilty to each, respectively, with leave to withdraw his pleas "at or before the October, 1894, term" of the court "at Du-

luth, in said district" (Record, p. 10), and thereupon an order was entered in each cause in the following words (Record, p. 11):

"Ordered that this cause be, and the same hereby is, continued to the October term, 1894, of this court, in the 5th divison of this district."

October 9, 1894 (Record, pp. 11, 12), at the October term of the 5th division, sitting at Duluth, in said 5th division, plaintiff in error withdrew his pleas to said indictments and demurred thereto, alleging as grounds thereof:

"That the grand jury which found and presented the said indictment did not have jurisdiction to inquire into or take cognizance of the matters and things set forth in the said indictment, in this, to wit, that the offence in said indictment alleged to have been committed, as appears from said indictment, was committed in the 5th division of the said district of Minnesota, and the said indictment was found and presented at a term of this court held in the city of Saint Paul, in said district, and outside the limits of said 5th division."

The demurrers thus filed were overruled, to which ruling and order plaintiff in error duly excepted, and thereupon again pleaded to the indictments, renewing, however, at every subsequent opportunity, the objection raised by the demurrers.

October 16, 1894, the court ordered the two causes consolidated "for the purposes of trial" (Record, p. 13); trial of the plaintiff in error under said indictments thereupon proceeded (Record, pp. 13 to 17); on the 20th day of May, 1895, a verdict of guilty was found under the second count of indictment No. 1717 and under indict-

ment No. 1826 (Record, p. 17); motion in arrest of judgment upon stated grounds was made and overruled and exception taken (Record, pp. 17 to 19); sentence was passed, and writ of error applied for and granted, May 29, 1895 (Record, pp. 20, 21); formal writ of error issued May 30, 1895 (Record, p. 1), and July 15, 1895, bill of exceptions was duly settled (Record, p. 43).

Upon the trial of the consolidated cases the plaintiff in error objected to all evidence offered on behalf of the United States on the ground that the said indictments did not charge any public offence against the laws of the United States, and particularly that said indictments contained no allegation that Truesdell was sworn on the occasion when he was alleged to have committed the perjury. This objection was overruled and exception duly taken (Bill of Exceptions, Record, p. 25). Precisely the same point was raised by prayer for instruction to the jury, overruled, and exception taken (Bill of Exceptions, p. 36).

Upon the trial below, plaintiff in error prayed the court to instruct the jury as follows:

"In this case you cannot find a verdict of guilty on the uncorroborated testimony of Truesdell, as he confesses himself a perjurer about the very matter in which the defendant is charged with crime, and, unless Truesdell's testimony is so corroborated by other evidence as to convince you beyond a reasonable doubt that the defendant procured him to commit that jury, you must bring in a verdict of acquittal."

This request to charge was refused by the court, and the accused then and there duly excepted to such ruling (Bill of Exceptions, p. 36).

Whereupon the court upon this point charged the jury as follows (Bill of Exceptions, p. 40):

"The offence charged is subornation of perjury, and if you are satisfied from the testimony of Truesdell (although he says he committed perjury at that time) that he was induced and instigated by the defendant to commit perjury, and that the defendant knew that Truesdell would commit perjury, and knew that the statements he was to answer to were false and knowingly false, then, notwithstanding the fact that Truesdell may have committed perjury, if you are satisfied beyond a reasonable doubt of that fact, the evidence of Truesdell would be sufficient under the law to establish the fact under the rule I have given you, that the defendant was guilty of subornation of perjury. Truesdell is not in the position of an accomplice, and even if he were, according to the law which is to be enforced in this court, the testimony of an accomplice uncorroborated is sufficient, for, although in this State we have a law which says that no person shall be convicted upon the uncorroborated testimony of an accomplice, that has no application in the Federal courts."

Upon the trial below, plaintiff in error, also, at several points, asked the court to charge the jury that no evidence had been submitted in corroboration of the testimony of Truesdell, which prayer was refused and exception thereto duly taken (Bill of Exceptions, p. 37).

Upon the trial of the cause, plaintiff in error also further requested the court to instruct the jury as follows, which prayer was denied and exception taken (Bill of Exceptions, p. 36):

"If you should find under the instructions given you by the court that the Government has proved that Truesdell committed perjury upon the occasion charged in the indictments, it is not sufficient that the defendant had good reason to believe or even that he knew that Truesdell, in

giving his testimony, was swearing to a falsehood. However great may be the moral obliquity of an attorney who continues to conduct a case in which he knows or has good reason to believe that his client is testifying to a falsehood, he does not thereby become guilty of the offence charged against this defendant."

By the testimony as it appears in the bill of exceptions, Truesdell at the trial and with reference to indictment No. 1826, relative to the Rice pre-emption claim, testified, in substance, that on the day of the Rice proof, February 3, 1894, plaintiff in error, in his own office, introduced him (Truesdell) to Rice and told him (Truesdell) "to go and swear to such statement as would be necessary to make a good proof; he got me to go as proof witness. I had never seen the man before." And when asked if plaintiff in error knew that they were not acquainted, the witness replied: "He certainly must have, for he gave me an introduction to him" (Bill of Exceptions, p. 31). William Craig, a subsequent witness, testified that in November, 1893, he was in the office of plaintiff in error when the latter introduced witness to Rice, Truesdell being present; that plaintiff in error then turned to Truesdell and said, "I suppose you know Rice"; and that in answer to this question Truesdell replied, "He ought to; he had been a neighbor of his for years up there or something like that" (Bill of Exceptions, p. 34). Upon the trial plaintiff in error in this connection asked the court to instruct the jury as follows, which request was refused and exception duly taken (Bill of Exceptions, p. 37):

"If you find, as the witness Craig testified, that, instead of the defendant introducing Rice and Truesdell the day they made their final proofs, as Truesdell testified, the defendant at or shortly before that time introduced Rice and Craig, and upon inquiry by him was told by Trues-

dell that he and Rice had been neighbors for several years, you must acquit the defendant upon the indictment with reference to the Rice claim, unless you find that he knew that Truesdell was making an untruthful statement in so stating to him."

February 3, 1896, at the instance of the United States, by way of suggestion of diminution of the record, a stipulation was entered into amending that portion of the record relative to the finding of the indictments so that should read as follows:

"*Ordered:* That the records herein be, and the same are hereby, amended *nunc pro tunc* as of July 20th, A. D. 1894, as follows, to wit:

THE UNITED STATES *v.* GEORGE W. POST. } Indictments Nos. 1717 and 1826 under Sec. 5493 R. S. of U. S.

"*Be it remembered*, That at the June, A. D. 1894, term of this court and on the 5th day of July, A. D. 1894, at St. Paul, Minnesota, a grand jury of the United States of America in and for the district of Minnesota was duly empannelled and on that day duly entered upon the discharge of its duties in and for the entire district of Minnesota, and was continuously in session from and inclusive of the said 5th day of July, A. D. 1894, to and inclusive of the 20th day of July, A. D. 1894, on which last day the said grand jury made its final report to the court and was discharged by order of this court, and that on said last-mentioned day it returned into court the indictments herein; that all of the persons whose names are endorsed upon the indictments herein were duly summoned by subpœnas as witnesses in the cases of The United States *v.* George W. Post before said grand jury prior to the said 5th day of July, A. D. 1894, and that in obedience to said subpœnas said witnesses were in actual attendance upon this court prior to the 12th day of July, A. D. 1894."

Assignments of Error.

Full and formal assignments of error are found at pages 48 *et seq.* of the Record, as well as in the brief of my associate at the commencement of his discussion of each particular question. Those principally relied upon are as follows, the numbering below being my own:

1. The court below erred in overruling the demurrers to the indictments; and also in overruling the motion in arrest of judgment, based upon the grounds set out in said demurrers.

Motion in Arrest of Judgment, Par. II, Record, p. 18.
Assignments in District Court, No. 12, *ib.* p. 24.
Assignments in Supreme Court, Nos. XII, XIII, XIV, *ib.* p. 51.

2. The court below erred upon the trial in admitting against the objection and exception of the defendant any evidence whatever under indictment No. 1717, for the reason that said indictment contains no allegation whatever that Truesdell "was sworn" prior to the alleged false swearing set out in said indictment.

Motion in Arrest of Judgment, Pars. I, III–g, Record, p. 18.
Assignments in Supreme Court, No. XII, *ib.*, p. 51.

3. The court below erred upon the trial in refusing to charge the jury, as requested by the plaintiff in error and in the charge as given, in respect to the legal form and effect of the uncorroborated testimony of Truesdell.

Assignments filed in District Court, No. 6, Record, p. 22.
Assignments filed in Supreme Court, No. VI, *ib.*, p. 49.
Assignments filed in District Court, No. 11, *ib.*, p. 23.
Assignments filed in Supreme Court, No. XI, p. 50.

4. The court erred in refusing to charge the jury, as at several points requested by plaintiff in error, that there was no evidence in the case corroborative of the testimony of Truesdell.

Assignments filed in District Court, Nos. 8, 10, Record, p. 23.

Assignments filed in Supreme Court, No. VIII, X, *ib.* 50.

5. The court below erred in refusing to charge the jury that it was not sufficient that plaintiff in error, as an attorney representing Truesdell and Rice, had good reason to believe or that he knew that Truesdell, admitting that fact to be shown, testified falsely; and that no matter how great the moral obliquity under such circumstances, the plaintiff in error was not guilty of subornation of perjury.

Asssignments in Supreme Court, No. V, Record, p. 49.

6. The court erred in refusing to instruct the jury, as requested by plaintiff in error, in respect to the conflicting testimony of Truesdell and Craig relative to the acquaintance of Truesdell and Rice prior to the testimony of Truesdell in the matter of the Rice claim.

Assignment No. IX, *ib.*, 50.

BRIEF.

Assignment No. 1.

The Jurisdiction of the Court.

Inasmuch as this was a criminal proceeding and was instituted for the trial of an alleged offence against the

laws of the United States, which offence was committed, if at all, in the 5th division of the Minnesota district, indictment, under the provisions of the act of July 12, 1894, could only have been found within the said 5th division. The indictments found within the 3d division were without authority of law and void; the court had no jurisdiction to try them; the demurrers were well founded, and in overruling the same, as well as in denying the motion in arrest of judgment, the court below proceeded in error.

In re Bonner, 151 U. S. 242.

The fact that the alleged offence was committed and the session of the court commenced prior to the passage of the act of June 12, 1894, is immaterial. The proceedings were "brought"—that is, the indictments were found—after the passage of the act, and hence were illegal and void.

Caha *v.* United States, 152 U. S. 211.

The amendment of the record by the stipulation made February 3, 1896, in no way changes the situation. The only additions to the record made thereby are the facts: (*a*) that the grand jury entered upon the discharge of its duties July 5, 1894, "for the entire district of Minnesota"; (*b*) that such grand jury was continuously in session from July 5, 1894, to July 20, 1894, inclusive; (*c*) that upon said last-mentioned date it made its "final" report; (*d*) that the witnesses summoned before it in the Post cases were subpœnaed prior to July 5, 1894; and (*e*) that such witnesses were in attendance upon the court prior to July 12, 1894.

All this in no way affects our contention that the indictments were not "brought" until the filing of the same July 20, 1894, eight days after the statute, because:

(*a*) There is no showing that the grand jury had commenced any examination of the case prior to July 12, 1894.

(*b*) And if they had, such examination would not be the "bringing" of a criminal proceeding. It would be simply an inquiry to determine whether any such proceeding should be "brought."

(*c*) And even if the cases were under consideration, the act of July 12, 1894, instantly ended their power in the premises to afterwards find a presentment or indictment.

(*d*) The summoning of witnesses, or their attendance prior to the act, was certainly not the bringing of a criminal proceeding. *Non constat,* their examination might result in refusing to make a presentment. As well might it be said that an examination by an attorney of evidence preparatory to filing a suit, without the issue of process and placing the same in the hands of an officer for service, would stop the running of a statute of limitation.

Assignment No. 2.

Truesdell not Sworn.

Indictment No. 1717 contains no averment whatever that prior to the alleged false testimony Truesdell was sworn. As the verdict was against the accused only upon the second count of this indictment, no reference is necessary to the first count thereof further than to say that it contains no allegation that Truesdell was sworn. The direct and only strictly pertinent allegation of the second count (p. 9) is:

"That the said affidavit, declaration, certificate, and testimony he, the said Sylvester Truesdell, then and there subscribed and swore to before A. J. Taylor, the register of the United States land office at Duluth."

At no place, however, anywhere in said count, is there any averment that prior to giving or subscribing the alleged false testimony the said Truesdell was duly sworn, or that any oath or obligation was administered to him.

Under such circumstances the indictment did not charge any offence against the laws of the United States; testimony thereunder was inadmissible; the court below proceeded in error in admitting such testimony, and the judgment must, for these reasons, be reversed.

1 Whart. Crim. Law, par. 1287.
2 Bish. Crim. Prac., par. 912.
United States *v.* Hearing, 11 Saw. 521.
United States *v.* McConaughy, 33 Fed. R. 168.
State *v.* Divoll, 44 N. H. 142.

In this regard there is no difference whatever between an indictment for perjury and an indictment for subornation thereof.

Whart. Crim. Law, par. 2271.
Commonwealth *v.* Smith, 11 Allen, 243.
U. S. *v.* Robinson, 23 N. W. R. 90.

The fact that indictment No. 1826 contains an averment that Truesdell "was duly sworn" does not cure the infirmity in indictment No. 1717. The indictments were consolidated and tried together. Evidence improperly admitted under No. 1717 might, and undoubtedly did, influence the jury in their verdict upon No. 1826. And there was actually a verdict of guilty upon the second count of No. 1717. In other words, the jury were obviously let to a verdict against the plaintiff in error by testimony erroneously admitted. The error is not divisable either in action or effect.

Neither of the indictments made a sufficient averment that the register was acting in a case where the law au-

thorized him to administer an oath. It is not sufficient to allege the materiality of the statements verified and the jurisdiction of the officer. The indictment must further allege facts to sustain these conclusions of law.

U. S. *v.* Robinson, *supra*.

The indictments seem to have been brought, and the Government appears to claim conviction, under sections 5392 and 5393 of the Revised Statutes of the United States. No other statute is apparently relied upon and these sections were read to the jury by the learned judge at the trial as containing the law governing the case (Bill of Exceptions, p. 39).

Section 5392 enacts that any person who has taken an oath before "a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered," etc., and shall thereupon testify falsely, shall be guilty of perjury.

Section 5393 enacts that any person who procures another to commit any perjury shall be guilty of subornation of perjury, and shall be punished as in the preceding section provided.

Under these sections an indictment, to be good, must aver that the "tribunal, officer or person," before whom the false swearing is alleged to have occurred, was "competent," in respect to the matter pending, and that competency under the authorities (*supra*) must be shown by properly alleged facts. Still further, any verdict, to be good, must have been procured upon proof of facts showing the competency of the tribunal.

As has been repeatedly held by this court, the register and receiver act in these matters as a quasi-judicial tribunal of special and limited jurisdiction. This being so, the special facts showing jurisdiction must be alleged and

proved before an oath taken therein can be made the basis of indictment.

In the cases at bar there is no showing, either in the indictments themselves or in the evidence, that A. J. Taylor, the officer before whom the false swearing is alleged to have occurred, was thus competent to administer an oath, unless it be an allegation that he was register of the United States land office at Duluth, and that the pending matters were pre-emption claims to certain public lands. This was clearly insufficient. The fact that he was register did not make him competent, certainly not unless there was some matter pending before him over which, as such register, he was authorized to act and, in so acting, to administer oaths. No such matter is even inferentially alleged in the indictments or shown by the testimony.

On the contrary, assuming that the matters pending were proceedings in the nature of proofs upon pre-emption claims to public lands, then another statute of the United States expressly declares that the "competent" tribunal shall be, not the register, but the register *and receiver* of the land office.

Revised Statutes of U. S., sec. 2363.

The inevitable result is: first, that no competency in the officer is shown; second, that even if the officer was generally competent, yet no proceeding is shown to have been pending in which he could have administered an oath; third, that the register was not alone the legal tribunal before which a pre-emption proof could be made. The judgment, upon these last-mentioned considerations alone, should be reversed.

ASSIGNMENT NO. 3.

The Charge of the Court as to Truesdell's Uncorroborated Testimony.

The question of the sufficiency of the uncorroborated testimony of Truesdell to justify a verdict is not one of principal and accomplice, and does not depend upon any statute, as the learned judge at the trial court seems to assume. The question depends upon fundamental principles, established by the wisdom of the law, to cover cases involving the liberty of the citizen when attacked by the oath of a confessed perjurer. In such cases the authorities are emphatic in declaring that no conviction shall be permitted upon the uncorroborated testimony of a witness so discredited.

People *v.* Evans, 40 N. Y. 1.

United States *v.* Hall, 44 Fed. Rep. 864.

ASSIGNMENT NO. 4.

Refusal of the Court to Charge the Jury that there was no Corroboration of Truesdell.

So far as the actual disposition of the case is concerned, it might be submitted upon the first three assignments above. But inasmuch as another trial, either upon the same or other indictments, must, in the event of reversal, be had, this court is asked to pass upon the question presented by the above assignment.

The court below, upon motion of the United States, incorporated in the bill of exceptions all the testimony given tending to corroborate the witness Truesdell (Record, pp. 25 to 36).

We assert that in all this there is not a word or syllable which is corroborative of the testimony of Truesdell that he swore falsely in any matter or thing to which he testified as charged in the second count of indictment No. 1717 or in indictment No. 1826. This point is fully discussed in the brief of my associate, pages 32 to 46, to all of which the attention of the court is earnestly invited.

On the question as to what is corroborative evidence in such a case as that at bar, my associate cites :

People *v.* Evans, 40 N. Y. 1, *supra.*
People *v.* Hoagenkirk, 96 N. Y. 149, 162.
Watson *v.* Commonwealth, 95 Penn. St. 418, 424.
Coleman *v.* State, 44 Texas, 109.
People *v.* Courtney, 28 Hun. 589.
Childers *v.* State, 52 Ga. 106.
McCalla *v.* State, 66 *ib.* 346.
People *v.* Koening, 99 Cal. 574.
Buchanan *v.* State, 24 S. W. R. (Texas) 895.
Conway *v.* State, 26 *ib.* (Texas) 401.
Commonwealth *v.* Holmes, 127 Mass. 424.
McNeally *v.* State, 36 Pac. R. (Wy.) 824.

ASSIGNMENT No. 5.

Error of Court in Refusing Instruction as to Status of Accused as an Attorney.

The plaintiff in error claimed that his sole connection with the entire matter, so far as the testimony of Truesdell was concerned, was that of an attorney representing a client. He was entitled to have the attention of the jury directed to that claim, and to have them instructed as to the law applicable to such a situation, as stated in the prayer hereinbefore quoted in full. It was error to deny such instruction.

Assignment No. 6.

The Refusal to Instruct as to the Testimony of Truesdell and Craig.

The claim of Truesdell that plaintiff in error had introduced him to Rice, an entire stranger, and had procured him (Truesdell) to testify falsely as to Rice's land claim, is the keynote to the alleged offence. If the testimony of Craig be true the charge necessarily falls. Craig's testimony, in any event, is flatly contradictory of Truesdell, impeaching the latter, if he were otherwise credible. Under these circumstances the plaintiff in error was entitled to have the attention of the jury called to this vital point, and his request to that effect should have been granted.

Respectfully submitted.

JAMES K. REDINGTON,
Attorney for Plaintiff in Error.

S. F. WHITE,
Of Counsel.

Office Supreme Court U. S.
FILED.
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In the Supreme Court of the United States.

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v.
THE UNITED STATES.
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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR THE UNITED STATES.

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POINTS AND ARGUMENT.

I.

The first assignment of error made for the plaintiff in error begins on page 10 of the brief of Mr. White, and is that the court erred in refusing the motion in arrest of judgment and in refusing to sustain the demurrers. The point relied on is that the court had no jurisdiction to try Post upon the indictments.

The motion in arrest of judgment appears on pages 17 and 18 of the record and the demurrers upon pages 11 and 12 of the record.

The demurrers set out:

> That the grand jury which found and presented the said indictment did not have jurisdiction to inquire into or take cognizance of the matters and things set forth in the said indictment, in this, to wit, that the offense in said indictment alleged to have been committed, as appears from said indictment, was committed in the fifth division of the said district of Minnesota, and the said indictment was found and presented at a term of this court held in the city of St. Paul, in said district, and outside of the limits of said fifth division.

An act approved July 12, 1894 (28 Stat. L., 102), provides that—

> All criminal proceedings instituted for the trial of offenses against the laws of the United States arising in the district of Minnesota shall be brought, had, and prosecuted in the division of said district in which such offenses were committed.
>
> SEC. 2. That this act shall take effect upon its passage.

It is insisted for plaintiff in error that by virtue of this statute the demurrers and motion in arrest of judgment on the question of jurisdiction were well taken.

The point made is "that the offense in said indictment alleged to have been committed, as appears from said indictment, was committed in the fifth division of the said district of Minnesota, and the said indictment was found

and presented at a term of this court held in the city of St. Paul, in said district, and outside the limits of said fifth division."

The only question raised is as to the indictment, and it points necessarily as to the time when the indictment was found.

The indictments, as shown in the record (pp. 7 and 9), were filed July 20, 1894.

The filing of the indictment was not necessarily the time that the "criminal proceedings [were] instituted." Criminal proceedings are instituted when the grand jury begins the investigation of the case. In these cases the conclusion upon the indictments may have been reached before July 12, 1894, when the act of Congress went into effect. There is nothing whatever to show that such was not the case. The demurrer does not strike at anything back of the filing of the indictment, but rests solely upon the assumption that the filing of the indictment after the act was passed was the institution of the criminal proceedings.

It can not be presumed that Congress intended, by making the act in question go into effect July 12, 1894, to render void all proceedings which had been begun and all indictments which had been found in cases where the indictments were not actually filed before July 12, 1894. The court would necessarily have to hold that, in order to sustain the point made for the plaintiff in error.

The demurrers and the motion in arrest of judgment do not raise the question as to whether or not the indictments were valid, if proceedings were begun upon them,

or if they were actually found by the grand jury before July 12, 1894, but were not filed until after that date.

It seems that the trial court was clearly right in overruling the demurrers and the motion upon the sole point which they presented.

If it had been the purpose to raise the question as to the validity of the indictments as predicated upon proceedings instituted before the act went into effect, but filed afterwards, the demurrers and motion in arrest should have been differently framed and the attention of the trial court should have been called to such question.

The argument for plaintiff in error is based solely upon the contention "that the finding of an indictment is the 'bringing' of an action for the trial of an offense." (Brief, p. 12.)

Not only the spirit but the letter of the act of July 12 was met in this case.

The supplemental record shows that the proceedings upon which these indictments were founded were begun before July 12, 1894, and that the witnesses had been summoned before that date and were in attendance upon the grand jury.

It surely can not be said that it was the purpose of Congress to draw the line at the time of filing the indictment and to treat as a nullity the institution of proceedings before the grand jury by which they had taken cognizance of a crime charged and had summoned witnesses to investigate it.

Besides, the whole purpose of the act, which doubtless had in view the securing of the trial at the place where it would be most convenient for the defendant, on

the assumption that he could more easily procure the attendance of witnesses where the offense was committed, was met in this case, for when the act of July 12, 1894, was brought to the attention of the court after the indictment was found the trial of the case was transferred to and actually took place in the fifth division, where the offenses were committed. (Rec., pp. 13, 14.)

But entirely independent of the foregoing considerations, the indictments should be sustained, for the act applies to "proceedings instituted for the trial of offenses against the laws of the United States *arising* in the district of Minnesota."

The language of this act is clearly prospective, and shows on its face that it was not intended to apply to proceedings instituted for the trial of offenses *that had arisen* when the act went into effect. If it had been the purpose of Congress to make the act retrospective it would not have used the word "*arising*" to define what was within the purpose of the act.

Mr. Justice Brewer, in *Cuha* v. *United States* (152 U. S., 214), said:

> The general grant of jurisdiction to the Oklahoma courts is prospective in its operation. Such is the ordinary rule of construction, etc.

While the presumption is stronger where vested rights are involved, nevertheless it is an accepted canon of construction that unless the intent be clearly expressed retrospective effect will not be given to a statute.

So far from there being any doubt here, the very language itself affirmatively shows that it was not the purpose of the legislature to interfere with proceedings

in respect of crimes which had arisen. It can not be supposed that Congress would have passed an act going into immediate effect which would have cut off proceedings of a court then in session which had jurisdiction over five divisions other than the one in which it was then held.

II.

The second ground for reversal urged in the argument (Brief, p. 15 *et seq.*) is based on the first assignment (Rec., p. 48) and the first and third grounds set forth in the motion in arrest of judgment. (Rec., p. 18.)

The point made is that the second count of the indictment No. 1717 on the Trusdell claim does not set forth that said Truesdell was sworn.

The plaintiff in error was found guilty on this count and on the Rice indictment, No. 1826. (Rec., p. 17.)

The indictment sets out that the plaintiff in error "did then and there willfully, unlawfully, and feloniously procure and suborn one Sylvester Truesdell *to take an oath* before a competent officer and person in a case in which a law of the United States authorized an oath to be administered that a certain written affidavit, declaration, certificate, and testimony by him, the said Sylvester Truesdell, subscribed were true, which said affidavit, declaration, certificate, and testimony he, the said George W. Post, then and there knew were untrue in manner following: George W. Post did then and there procure the said Sylvester Truesdell to subscribe his name and *make an oath* to a certain written affidavit, declaration, certificate, and testimony, which said affidavit, declara-

tion, certificate, and testimony were required of a pre-emption claimant by the laws of the United States * * * that *in said affidavit*, certificate, declaration, and testimony he, the said Sylvester Truesdell, did then and there allege, declare, and *swear* concerning said land, among other things, in substance and effect as follows: " * * * that *the said affidavit*, declaration, certificate, and testimony he, the said Sylvester Truesdell, then and there subscribed *and swore to before A. J. Taylor*, the register of the United States land office at Duluth, who was then and there an officer and person *competent to administer said oath;* that said affidavit, declaration, certificate, and testimony were then and there a case in which a law of the United States authorized an oath to be administered." (Rec., pp. 5, 6.)

The point made in the brief (p. 16 *et seq.*) is that the indictment nowhere alleges that Truesdell "was sworn."

It does allege that he did "take an oath before a competent officer and person in a case in which a law of the United States authorized an oath to be administered," and that he took "an oath" that a certain written affidavit subscribed by him was true. It says that Post procured him "to make an oath" to this affidavit, and that in said affidavit he did "declare and swear," and that he "then and there subscribed and *swore to* before A. J. Taylor, the register of the United States land office at Duluth."

All of these are affirmative averments. While they do not say that the witness was sworn *ipsissimis verbis*, yet they do, in language fully equivalent, aver that he was sworn.

This indictment is under section 5393, Revised Statutes, which says that "every person who procures another to commit any perjury is guilty of subornation of perjury."

Section 5392 defines perjury as "having taken an oath before a competent tribunal" willfully and falsely, etc.

Thus the indictment, in saying that he took "an oath" falsely, charged the offense of perjury in the very language of the statute.

The averments are sufficient under section 5396 of the Revised Statutes, which declares that—

> In every presentment or indictment prosecuted against any person for perjury it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom *the oath* was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed.

The very purpose of this section, which was taken from the *Act of April 30, 1790*, section 19 (1 Stat. L., p. 116), was to do away with technicalities. The indictment sufficiently advised the defendant of the charge which he had to meet, and a conviction upon it would be a clear defense to a new indictment for the same act.

Reliance is placed in the brief for plaintiff in error upon the case of *United States* v. *Hearing* (11 Sawyer, 521).

That case is clearly distinguishable from this case. In it the indictment, after setting out the substance of the affidavit which was said to be false, averred that Hearing "did then and there, before C. H. Stewart, clerk of the courts for Linn County, Oreg., then and there having full authority to administer said oath, falsely, knowingly, and contrary to the said oath, depose and state that the foregoing and hereinafter set forth affidavit was true."

The indictment did not state that he made any oath, but simply averred that he did "depose and state" before one having the right to administer an oath.

Subsequently the indictment stated that the said defendant, "when he took said oath and made said statements," well knew the same to be false. This is the only averment, direct or indirect, that he took an oath, and Judge Deady very properly held that the averment charging that he knew that they were false "when he took said oath and made said statements" could not supply any defect in that part of the indictment which failed to charge in any way that he had taken an oath.

The case of *United States* v. *McConaughy* (33 Fed. Rep., 168) is cited in the brief (p. 16).

The indictment in that case, after citing the pendency of the proceeding before the register and receiver, alleged that the defendant offered himself as a witness therein on his own behalf, and "did subscribe his name to a deposition in the words and figures following." The indictment then alleges that the defendant did in said proceeding

willfully and corruptly depose and swear that the answers which he had made to the questions in said deposition contained were, to the best of his knowledge and belief, true; that the "said oath" in said proceeding, "taken as aforesaid" by said defendant, "was then and there duly administered" to him by said register and receiver.

This decision is highly technical and rests upon the distinction that one may "swear" who is not "duly sworn."

While it is true, as said in the opinion, that it is not sufficient that it appears by inference or argument that the witness was sworn, nevertheless it is urged, with all respect for the learned judge, that in that case it was not a matter of inference or argument, but that it necessarily appeared that the defendant was sworn.

The court says (p. 169) that "the case in this respect is nearly on all fours with that of *United States* v. *Hearing* (11 Sawyer, 521)." A comparison of the two cases will disclose that there is a wide difference between them.

To sustain the holding Judge Deady cites Wharton's Criminal Law (sec. 1287), Bishop's Criminal Procedure (sec. 912), and *State* v. *Divoll* (44 N. H., 140). These authorities do not go to the extent to which Judge Deady went in the McConaughy Case.

In the Divoll Case the court said that "the allegation is merely that the defendant made and subscribed the following false oath," reciting it (p. 142).

The authorities on page 143, cited with approval as showing that the averment was insufficient, show that great variation is allowed, provided the substance of the averment be made.

Among others, the following were sufficient: "Took his corporal oath," 2 Ch. Cr. L., 184, 189, 195, 258; "did take his oath," 2 Ch. Cr. L., 185; "did take his corporal oath, and then and there did swear," Whar. Prac., 300, 304.

Now, as has been shown, in the second count of the Truesdell indictment it is averred that plaintiff in error procured Truesdell to "take an oath" and that he did "make an oath."

These averments bring this indictment within the authorities relied on in the Divoll Case, and distinguish it from that case.

Bishop on Criminal Procedure (sec. 912) says that "on principle it would be sufficient to say that the defendant gave, on the trial of the issue, such and such testimony on his oath duly administered and taken."

Wharton's Criminal Law (sec. 1287) says it would be sufficient to aver that the defendant "did then and there, in due form of law, take his corporal oath."

In neither of these forms is there any averment that the witness "was sworn."

The averments necessarily imply that he was sworn, for without being sworn he could not make an oath.

Attention is called to the fact that in the Rice indictment (Rec., p. 8, line 20) it is averred that Truesdell "was duly sworn and took his oath," and so, whatever doubt may arise in respect of the second count of the first indictment, none can exist as to the Rice indictment, and indeed this point is not made in the argument in respect of that indictment.

It is stated on page 19 of the brief, and under the second point, that neither of the indictments show that any proceedings were pending before the register, and that enough is not averred to show that there was a case where the law authorized administering the oath.

The second count of the first indictment alleges that the proceeding was "in a case in which a law of the United States authorized an oath to be administered." (Rec., p. 5.)

It further alleges that the affidavit was such as was "required of a preemption claimant by the laws of the United States relative to the application and claim made by preemption of the said Sylvester Truesdell." It then describes the land.

On page 6 it avers "that said affidavit, declaration, certificate, and testimony were then and there a case in which a law of the United States authorized an oath to be administered."

The substance of the affidavit is then set forth.

The indictment further states "that the said matters in said affidavit, declaration, certificate, and testimony so falsely and untruly stated as aforesaid were each and all of them material matters and statements," etc. (Rec., p. 6.)

The Rice indictment sets out that Post procured Truesdell to appear and falsely make oath to facts "in support of the preemption claim of one William Rice, which said oath, affidavit, certificate, declaration, and testimony were required by law and the rules and regulations of the Land Office and the Interior Department of the United

States, and were made relative to the application or claim by preemption of the said William Rice, who was then and there a preemption claimant," etc. (Rec., p. 7.)

It further avers that "the matter in which he was so sworn and took his oath was then and there a case in which a law of the said United States then authorized an oath to be administered, and it then and there, at and upon the making and subscribing of said oath, affidavit, declaration, certificate, and written testimony as aforesaid, became and was a material question how long the said Truesdell had known the said Rice." (Rec., p. 8.)

Certainly the indictments were full enough in this respect, upon the authority of the case of *Markham* v. *United States* (160 U. S., 319, 325).

III.

The third ground urged in the brief is based upon the sixth and eleventh assignments of error, as follows:

> VI. The court below erred in refusing to charge the jury, as requested by the plaintiff in error, upon the trial of the cause: "In this case you can not find a verdict of guilty on the uncorroborated testimony of Truesdell, as he confesses himself a perjurer about the very matter in which the defendant is charged with crime, and unless Truesdell's testimony is so corroborated by other evidence as to convince you beyond a reasonable doubt that the defendant procured him to commit that perjury you must bring in a verdict for acquittal;" to which refusal of the court to charge as requested the plaintiff in error did then and there duly except. (Rec., p. 49.)

XI. The court erred in charging the jury: "The offense charged is subornation of perjury, and if you are satisfied from the testimony of Truesdell (although he says he committed perjury at that time) that he was induced and instigated by the defendant to commit perjury, and that the defendant knew that Truesdell would commit perjury and knew that the statements that he would swear to were false, and knowingly false, then, notwithstanding the fact that Truesdell may have committed perjury, if you are satisfied beyond a reasonable doubt of that fact, the evidence of Truesdell would be sufficient under the law to establish the fact under the rule I have given you that the defendant was guilty of subornation of perjury. Truesdell is not in the position of an accomplice, and even if he were, according to the law which is to be enforced in this court, the testimony of an accomplice uncorroborated is sufficient, for, although we have in this State a law which says that no person shall be convicted on the uncorroborated testimony of an accomplice, that has no application in the Federal courts;" which said charge was the exact converse and opposite of the charge requested by the plaintiff in error and refused by the court; to which he did then and there duly except. (Rec., pp. 50, 51.)

The question presented is whether or not the judge erred in charging the jury that they could convict upon the uncorroborated testimony of Truesdell.

The charge states:

> The defendant is presumed to be innocent of this offense until he is proved guilty beyond a reasonable doubt. The presumption of innocence remains with him until the jury are thus satisfied of his guilt, and it is necessary for the Government to make such

> proof as satisfies you beyond a reasonable doubt that the defendant is guilty of the offense as charged in the indictment, either of one count or more or all of them. (Rec., p. 39.)

Again:

> That the jury must be satisfied beyond a reasonable doubt from the evidence. (Rec., p. 40.)

Again:

> Unless the Government establishes that fact beyond a reasonable doubt to your satisfaction the defendant would not be guilty. (Rec., p. 41.)

Therefore, the charge on this point, in substance, was that if Truesdell testified to the fact of subornation, and the jury believed his testimony beyond a reasonable doubt, they could upon his testimony, without corroborating proof, convict.

This question is not free from difficulty, and there is conflict in the authorities.

In *United States* v. *Thompson* (31 Fed. Rep., 331) Judge Deady took the same view of the law as Judge Nelson did in this case.

He said:

> Therefore, if, all the circumstances considered, the jury are satisfied beyond a reasonable doubt of the guilt of the accused, from the evidence of an uncorroborated accomplice or that of a witness who has committed the perjury which he is charged with procuring, they may and ought so to find, and the court may not on that account interfere with the verdict (p. 333).

This case is directly in point and is in line with the modern tendency, which is to discard the ancient rules requiring a certain *quantum* of evidence, but leaves it to the jury to judge of the credibility of the testimony and permits them to find a verdict if, upon evidence which they regard as credible, they have no reasonable doubt of guilt.

The old rule was that to convict of perjury two witnesses were necessary, but this has been relaxed, and a conviction may be had upon any legal evidence of a nature and amount sufficient to outweigh that upon which perjury is assigned. (*United States* v. *Wood*, 14 Pet., 430; *Com.* v. *Butland*, 119 Mass., 317; *State* v. *Heed*, 57 Mo., 252; *Williams* v. *Com.*, 91 Pa., 501; 1 Greenleaf Ev., secs. 257 to 260.)

It did not at common law require two witnesses to establish the charge of *subornation of perjury*. The direct evidence of one witness entitled to full credit was sufficient for proof of any fact except perjury and treason. (Blackstone's Com., vol. 4, p. 256.)

Subornation of perjury may be proved by one witness. (*Com.* v. *Douglass*, 5 Met., 241.)

It was held in *United States* v. *Wood* (14 Pet., 430), in a very elaborate opinion, discussing the doctrine of what testimony was sufficient to convict of perjury, that it is not necessary for the prosecution to produce a living witness to testify to the falsehood of the facts sworn to if the jury believe the written evidence contained in the defendant's letters, and in other documents recognized by him as genuine, proves he made a false and corrupt oath.

The court held that it was not bound by an arbitrary and peremptory rule the reason of which did not apply, and shows, on page 441, how the rule that two witnesses were required to convict in a case of perjury has been steadily expanded beyond its literal terms.

This case, of course, is different, not being a case of perjury, and what has been said in respect of proving perjury is mainly to show the tendency of the modern doctrine. This is a case of subornation of perjury, and, of course, Truesdell could not have been an accomplice of Post in committing this crime.

He could not have been indicted for that offense. It is similar to the case of one who is indicted for advising and procuring a miscarriage. For that offense the woman could not be an accomplice. (*Dunn* v. *The People*, 29 N. Y., 527.)

Post and Truesdell may have been accomplices in seeking to bring about the fraud, in furtherance of which the perjury was committed. In the very nature of things the crime of subornation was committed by Post alone. Therefore, in an indictment against him on this charge Truesdell is not an accomplice. The law is clear that one may be convicted of subornation of perjury by one witness, provided the jury believes his testimony beyond a reasonable doubt. (*Commonwealth* v. *Douglass*, 5 Met., 241.)

The jury are the sole judges of credibility. (*Moore* v. *State*, 68 Ala., 360; *Ex Parte Warrick*, 73 Ala., 57; *Jones* v. *State*, 48 Ga., 163; *Bowers* v. *People*, 74 Ill., 418; *Terry* v. *State*, 13 Ind., 70; *Knitner* v. *State*, 45

Ind., 175; *State* v. *Miller*, 53 Iowa, 209; *State* v. *Smallwood*, 75 N. C., 104; *Brown* v. *State*, 18 Ohio St., 496; *Chester* v. *State*, 1 Tex. App., 702; *People* v. *Bodine*, 1 Edm. Sel. Cas., 36.)

The law disqualifies certain persons from testifying, such as those convicted of an infamous offense. If any witness be not disqualified, and thus competent to give his testimony, the jury can act upon it. They should take into consideration anything affecting his character, such as in this case the admitted perjury of Truesdell. If admitted perjury puts the witness in the position of having applied to him the unbending rule *falsus in uno, falsus in omnibus*, then it is perfectly manifest that a witness who admits that he committed perjury stands under the operation of this rule in the same plight as if he had been convicted of perjury and entirely disqualified to testify.

Pushing the logic of this still further, it also follows that there could be no conviction on such testimony, and proven corroborative circumstances, for, inasmuch, as the jury must disbelieve his testimony altogether, the corroborating circumstances would stand alone and as the only testimony to which credit could be given.

As said in *Stoffer* v. *The State* (15 Ohio St., 55), in speaking of the discussion of this maxim by Mr. Starkie, where the perjury has been committed in giving the testimony in the case on trial:

> Now, if, as this author says, the presumption that such a witness will speak the truth, *is wholly gone*, and for this reason his testimony is to be rejected, what, in the nature of things, can remain to submit

> to a jury, and from which they are to make up that *complement* of proof which establishes facts, as a foundation for the judgment of courts? Is not this yielding the witness *partial* or *fractional* credit? And that in the face of the fact, that before the eyes of the very tribunal which accords him this credit, and in the very proceeding he has committed willful and corrupt perjury. To say that facts may be found upon his testimony notwithstanding, or that they may be found *in part* upon it, is a difference in degree only and not in principle. The other evidence, although in a greater or less degree corroborative of his, is yet supposed to be insufficient to establish the fact in issue; and it is utterly impossible still to find the fact without giving credit to the perjured witness.

And, as said in *Dunn* v. *The People* (29 N. Y., 529):

> If the testimony of such a witness were by law unfit to be considered, no amount of consideration, or of intrinsic probability or coherence of circumstances, or explanation of the former testimony would carry it to the deliberations of the jury.

It would also follow that if one in the same transaction had suborned more than one witness to commit perjury, which they all confessed he could not be convicted upon, the concurrent testimony of any number, no matter how great, of such persons, for the jury, applying the principle *falsus in uno, falsus in omnibus* to each witness, would be compelled successively to reject their testimony.

It will be observed that while the perjury in question was committed in respect of the same subject-matter upon which the indictment was based, nevertheless it was not in this proceeding. Therefore, if the rule invoked for plaintiff in error should be held applicable in this case,

it must be upon the doctrine that when a man once commits perjury, he is, without any conviction, and without being made infamous by law, in fact so contaminated that, a jury can, in no other proceeding, give any credit to his testimony if the fact be shown that he was once a perjurer. Judge Deady in the *Thompson Case* (31 Fed. Rep., 333), in speaking of the maxim *falsus in uno, falsus in omnibus*, said:

> I think this maxim has no application to any falsehood spoken by the witness on any other occasion than the one in which his evidence is being considered by the jury. Nor do I think that the weight of modern judicial opinion or legislation favors the doctrine that a false statement presently made by a witness shall have any other or greater effect than to cause him to be distrusted generally, leaving the jury, under proper instructions, to judge of his credibility, and give such weight to his evidence as they think it entitled to.

No case has been cited by opposing counsel where this maxim has been applied or where the discredit following from perjury has been made the grounds of the decision where the false testimony was given in a trial other than that in which the witness was then testifying, and no such case has come under my observation.

Mr. Starkie, in his work on evidence (vol. 1, 873), which is generally quoted where this doctrine has been applied, shows from the context that what he says in respect of the application of this maxim is in contemplation of the particular case under trial. The rule as laid down by Mr. Starkie is not now accepted even where the false testimony is given in the particular case under trial.

The modern doctrine is well stated in *Grimes* v. *The State* (63 Ala., 168), as follows:

> The maxim was, it may be, formerly regarded as more inflexible and of larger application than it is now by the current of authority. It is borrowed from the civil law, and was particularly directed to tribunals charged with the determination of matters of fact, and was by them applied according to the facts of the particular case. It is generally admitted by the courts of common law making the most rigid application of the maxim, that if the witness is corroborated by unexceptionable evidence the jury are not bound to discredit him. We are prepared to follow the line of authorities which hold the maxim is not a rule of law, operating a disqualification of the witness, to be given in charge to the jury as imperatively binding them—that it is to be applied by the jury, according to their sound judgment, for the ascertainment and not for the exclusion of truth. (*State* v. *Williams*, 2 Jones (Law), 257; *Parsons* v. *Huff*, 41 Me., 410; *Knowles* v. *The People*, 15 Mich., 408; *Fisher* v. *The People*, *Ib.*, 135; *Mead* v. *McGraw*, 19 Ohio St., 55; *Shellabarger* v. *Nafus*, 15 Kansas, 547; *Blanchard* v. *Pratt*, 37 Ill., 243; *Calloman* v. *Shaw*, 24 Iowa, 441; *Mercer* v. *Wright*, 3 Wisc., 568; *Wilkins* v. *Earle*, 44 N. Y., 182; *Moore* v. *Jones*, 13 Ala., 296; 1 Whart. Ev., sec. 412.)

The brief for plaintiff in error relies mainly upon the case of *People* v. *Evans* (40 N. Y., 1), which is quoted from extensively, beginning at page 24 of the brief.

This case was noticed by Judge Deady in the Thompson Case and he declined to follow it. It was considered by the trial judge in this cause, and he did not regard it as sound.

It is urged that the Evans Case is like the one under consideration, the only difference being in the amount of the bribe. The cases are materially different.

In that case the witness Near swore not only as to the subornation, but as to his former perjury. So did Truesdell in this case. The difference between the two cases lies in this. The portion of the charge under criticism in the case at bar was that the jury might find the fact of subornation from the uncorroborated testimony of Truesdell. While Truesdell testified that he swore falsely, it was abundantly proved by other testimony in the case that he did so swear. In the Evans Case the charge of the court was not confined to the testimony of Near in respect of the subornation, but applied to his whole testimony, covering both elements of the crime. (40 N. Y., p. 3.) It will be observed that the court lays great stress in deciding the case upon that part of the testimony in which Near swore "that he swore false and committed the crime of perjury in regard to this same matter" (p. 3). In discussing the case and stating the propositions and the substance of what the jury would have to find in order to convict, which the court does in a very striking way, great prominence is given to the feature that they must find from the uncorroborated testimony of Near that he had committed perjury.

The learned judge, on the face of the opinion, states that the case is an exceptional one, and says "there must be some exceptions to all general rules, and I would make this case an exception to the general rule, that a prisoner may be convicted on the uncorroborated testimony of an accomplice."

He said the case was such that the jury was compelled to say of the perjury "This we find as the *corpus delicti* in this case, and we find this on Near's own evidence alone because he swore to it." No such finding can be predicated of this case.

It has always been held that it requires two witnesses, or one witness and corroborating circumstances, to prove the perjury, for otherwise there would be oath against oath.

If the jury, as in the Evans Case, had no evidence that perjury was committed except the testimony of the one who was suborned, then on that point there would be no evidence, for the jury would have before them the same man swearing to exactly opposite things. There was other evidence in this case showing the perjury.

The reasoning of the Evans Case, upon the maxim *falsus in uno, falsus in omnibus,* has not been followed in New York.

While it has not been distinctly overruled, and no case exactly like it has come up where the sole evidence was the uncorroborated testimony of the perjurer, both as to the fact of perjury and subornation, yet the authority of the case has been much weakened, if not entirely overthrown, upon the application of the maxim *falsus in uno, falsus in omnibus.*

The Evans Case was decided on the authority of the case of *Dunlop & Meigs* v. *Patterson* 5 Cowen, 243 (40 N. Y., 6).

The Dunlop Case was commented upon unfavorably in *Dunn* v. *The People* (29 N. Y., 528), the court saying

that it left the question of law as to the character of such testimony in a very unsatisfactory position, and holding that—

> The true question is whether, when it appears that the witness has sworn differently upon the same point on a former occasion, he is to be pronounced by the judge to be incompetent, and his testimony stricken out and wholly excluded from consideration, as though he had been convicted of a crime rendering him incompetent to testify as a witness, or whether the testimony remains in the case to be considered by the jury in connection with the other evidence under such prudential instructions as may be given by the court and subject to the determination of the court having a jurisdiction to grant new trials in cases of verdicts against evidence. In my opinion the latter is the correct principle of law (p. 529).

In *Warren* v. *Haight* (62 Barbour, 492), the court said:

> The case of *Dunlop* v. *Patterson* (5 Cowen, 243), is at best ambiguous. It does not clearly appear from the opinion whether the judgment was reversed because the evidence of the perjured witness should have been *entirely* disregarded, or because the court had not properly instructed the jury in regard to the weight which they should give to it. It is qualified by *The People* v. *Evans* (40 N. Y., 5, 6). And the authority of the latter case has, to my mind, been entirely destroyed by the case of *Dunn* v. *The People* (29 N. Y., 526, 528).

In *Pease* v. *Smith* (61 N. Y., 483), the court, speaking through that distinguished jurist Judge Dwight, said:

> All testimony, when once admitted in the cause, is, in general, for the jury to consider, whether it be

> that of an accomplice in crime, or of a person discredited as to his general character, or not strictly regardful of the truth.

The Evans Case was cited, and the court immediately thereafter added:

> There may be an exception to this rule where the witness is shown to be guilty of perjury, though not convicted of the offense (p. 484).

This of itself throws doubt upon the authority of the Evans Case upon this point.

In *Place* v. *Minster et al.* (65 N. Y., 103) the same judge said:

> The cases which go to show that the testimony of the witness who contradicts himself, or who is impeached by the testimony of others, must be rejected by the judge, can not be regarded as law in this State.

In *Gearing* v. *Metcalf* (74 N. Y., 504) the Dunlop Case was again reviewed, the court saying:

> This case has been commented on in *Dunn* v. *The People* (29 N. Y., 523) and limited.

In that case, after a review of the New York decisions, which the court said were not reconcilable, the judgment of the court was reserved on the question here involved, Judge Folger saying:

> How it would be in a case where it was, to our judgment, conclusively shown that the witness was corruptly false we are not now called upon to say (p. 507).

But if the charge complained of be technically wrong the error was innocuous, for there was other undisputed corroborative proof upon the question of subornation, and

therefore the jury could not have convicted upon the testimony of Truesdell alone. The charge in permitting them to do this in no sense directed them to ignore or discard the other proof.

The corroborating proof, in respect of the second count of the first indictment and of the Rice indictment, is as follows:

A. J. Taylor, the register, identified the preemption proofs (Rec., p. 25), and testified that they were sworn to and subscribed before him by Truesdell.

These proofs are set out as Exhibits A and B. (Rec., pp. 43, 46.)

Lesage, the proof clerk, testified that Post was in and out when the proofs were being made. (Rec., p. 26.)

Truesdell testified that he first went to the land in question with Post and others in October, 1893.

The statement that these parties went there in 1893 is corroborated by Neilson. (Rec., p. 32.)

This witness testified that "on the trip up there defendant told me that he was going to locate Truesdell on the land in question; that Lefleur had abandoned the claim" (p. 32).

Defendant testified that money was paid him by Truesdell "to get Lefleur, whom he had previously located on the land, off the land" (p. 28).

Thus it is shown that defendant well knew that Truesdell had never entered the land before 1893. Notwithstanding this fact he acted for him in procuring the preemption, in the proof of which Truesdell swore that he had settled on the claim in 1890, had built a house, cleared land, cultivated it, and made it his home.

The proof shows that the defendant was on the Rice claim in 1891 and had located Dan Jones on it. It is further shown that he told Carlson and Neilson to go to the Rice claim, "cut some brush, and make it look as though somebody had been living there, and put some boughs on the bed and cut underbrush and make it look like a new clearing" (p. 32).

Carlson testified that he was instructed by the defendant "to estimate the pine and fix up the shanty on the Rice claim, as he (defendant) was going to file some people upon it when it came into market, and defendant told me to put in a window so as to make it appear that some one had lived on it," and that he did this and informed defendant what he had done. (Rec., p. 33.)

Evans testified that defendant, in charge of a party, located Jones upon the Rice claim in 1891. (Rec., p. 33.)

O'Conner testified that in the spring of 1893 the defendant was on the Truesdell claim and made arrangements to purchase the shanty of him. (Rec., p. 34.)

Hill corroborates Truesdell in his statement about his going to the land with defendant and others. He also testified that he was instructed by Post to fix up the camp on the Rice claim. (Rec., p. 34.)

The defendant admitted that he had a mortgage of $500 given him by Rice on the land secured by him through his preemption, and he also admitted that he was the attorney before the land office in making the proofs to the Rice and Truesdell claims. (Rec., p. 35.)

He was contradicted by the witness Cary on a material point (Rec., p. 30), and after testifying that he was

to receive from Truesdell $150 to get Lefleur off the land, he admitted that he knew at the time that Lefleur had abandoned the claim. (Rec., p. 29.)

The proofs in the Rice claim, in respect of the making of which defendant admitted that he acted as attorney, show that Truesdell swore that Rice first settled upon the land in 1890, that he cleared land, built a house, cultivated the land, and made it his home. (Rec., p. 45.)

The defendant is identified with the transactions from beginning to end, by testimony entirely independent of Truesdell's. His interest is shown and his knowledge of false swearing is abundantly established.

It would be hard to weave more convincing proof around a defendant upon a charge of subornation of perjury. The only corroborative facts usually susceptible of proof are the circumstances identifying the defendant with the transaction, and showing his guilty knowledge, each fact itself perhaps being but a thread, but all of them combined being sufficient to enmesh the defendant in a toil from which, taken in connection with the testimony of the suborned party, there is no escape.

If conviction can not be sustained upon such testimony this crime will always go unpunished. When such an offense is about to be committed there are usually but two parties to the transaction, and they do not get on a house top and proclaim it, nor do they have the agreement solemnly attested. Such schemes are, as a distinguished judge once said of fraud, "hatched in a hollow log."

IV.

The brief (p. 32 *et seq.*), in anticipation of another trial (see brief, p. 31), discusses the eighth and tenth assignments of error, which are as follows:

> VIII. The court erred upon the trial of said cause in refusing to charge the jury as requested by the plaintiff in error: "There is no corroboration of Truesdell's testimony in the case, and you are therefore directed to bring in a verdict of not guilty;" to which refusal to charge the jury as requested the plaintiff in error did then and there duly except. (Rec., p. 50.)
>
> X. The court below erred upon the trial of said cause in refusing to charge the jury as requested by the plaintiff in error: "You are directed to find in favor of the defendant in this case with regard to the Rice claim for the two reasons:
>
> 1. That the testimony of Truesdell with regard to his alleged solicitation to commit perjury by the defendant is too vague and indefinite to sustain a conviction on that indictment.
>
> 2. That Truesdell's testimony as to this case is entirely uncorroborated;" which refusal to charge the jury as requested was then and there duly excepted to by the plaintiff in error. (Rec., p. 50.)

The only aspect of the case in which these assignments need be discussed here is with reference to the position of the Government that, even if the court erred in charging that the jury could convict on the testimony of Truesdell alone, yet there was corroborative evidence which this charge did not exclude the consideration of, and that therefore the error was innocuous. Of course, this point could not be well taken if there were no

corroborative testimony, and the discussion of these assignments raises that question.

Portions of the corroborative proof have been set out in this brief in the discussion of the last assignment.

It is argued (pp. 35, 36 of the brief) that the corroborative testimony was introduced in respect of the first count of the Truesdell indictment, and that, inasmuch as the jury did not convict on that, they disbelieved the main evidence, of which this proof was corroborative, and that this proof can not be looked to as corroborative of the second count of the first indictment.

All of the evidence in this record is shown by the bill of exceptions to have been introduced in respect of these indictments.

The court states (Rec. p. 35) that:

> There was other testimony given in the trial of the case in reference to the charge contained in the first count of the indictment with reference to the Truesdell claim, but the foregoing is a statement of all the testimony given upon the trial of the cause that has any reference to the second count of the indictment with reference to the Truesdell claim or to the indictment with reference to the Rice claim, and also of all the testimony given on the trial of said cause tending in any manner to corroborate the testimony of the witness Truesdell with reference to any of the counts of either indictment.

The substance of these assignments is that the court did not pass upon the weight of this corroborative testimony and instruct the jury that there was no evidence before them. This was asking the court to usurp the

province of the jury, and it was no error in the court to decline to grant the request.

A number of cases are cited in the brief (p. 37 *et seq.*) which go off upon the point of the corroboration of the testimony of an accomplice. As these parties were not accomplices in the crime for which Post was indicted these authorities have no application. In a number of these cases the reviewing courts, under the practice prevailing in those States, considered not only errors of law, but reviewed and passed upon the weight of the testimony, and, of course, such decisions can have no weight in the United States courts, which do not review the testimony, except to see whether or not there was any competent evidence tending to sustain the verdict.

Even under these authorities, it is insisted, for the Government, that the fact that Post acted as attorney in preparing these proofs and was present when they were sworn to and knew their falsity, taken in connection with his interest, is corroborative evidence on a material point.

V.

The next ground for reversal relied on in the brief (p. 47) is the fifth assignment, as follows:

> The court below erred in refusing to charge the jury as requested by the plaintiff in error: "If you should find, under the instructions given you by the court, that the Government has proved that Truesdell committed perjury upon the occasions charged in the indictments, it is not sufficient that the defendant had good reason to believe, or even that he knew that Truesdell, in giving this testimony, was swearing

to a falsehood. However great may be the moral obliquity of an attorney who continues to conduct a case in which he knows or has good reason to believe that his client is testifying to a falsehood, he does not thereby become guilty of the offense charged against the defendant;" to which refusal to charge as requested the plaintiff in error did then and there duly except. (Rec., p. 49.)

This was refused by the court except as given in the general charge. (Rec., p. 36.)

The court charged that the jury must find that Truesdell "was induced and instigated by the defendant to commit perjury, and that the defendant knew that Truesdell would commit perjury, and knew that the statements he was to swear to were false and knowingly false." (Rec., p. 40.)

Again:

Although the perjury of Truesdell is involved in this case, the testimony must go further, and the jury must be satisfied beyond a reasonable doubt from the evidence that the defendant, George W. Post, knew that Truesdell would commit perjury a the time he swore to these final proofs of his [illegible] and as a witness for Rice, and that he instigated and procured him so to do, and that these statements were willfully and corruptly false. Unless the Government establishes that fact beyond a reasonable doubt to your satisfaction, the defendant would not be guilty, although you might find that Truesdell was guilty of perjury, for not only is the perjury of Truesdell involved in this case, but the offense is that the perjury that he committed at the time he made the false declarations under oath before Mr. Taylor he was induced to commit and to swear to

these declarations under oath by the defendant, George W. Post. You must be satisfied beyond a reasonable doubt that the proof shows that Truesdell was suborned by the defendant to commit the perjury when he swore before Mr. Taylor in his final proofs in his own case and as a witness in the final proofs of Rice. (Rec., pp. 40, 41.)

Again:

The great questions in this case which it is necessary for the Government to prove beyond a reasonable doubt are: Did Truesdell commit perjury when he testified before Mr. Taylor in his final proofs or as a witness in the final proofs of Rice? Was he induced, if he did commit perjury, was he procured or instigated by the defendant, George W. Post, to commit that perjury? Did the defendant know that Truesdell would make declarations under oath which were false in regard to his own claim or that of Rice, and did he, knowing that Truesdell would commit that perjury, induce him to make those false statements before the land officer, not only knowing that the statements which Truesdell made were false, but that Truesdell would make those false statements? (Rec., p. 42.)

Again:

If in your opinion Truesdell did commit perjury, but the Government has failed to prove beyond a reasonable doubt that the defendant procured and instigated Truesdell to commit that perjury, then the defendant would be entitled to a verdict of acquittal. (Rec., p. 42.)

Again:

Unless the Government, in addition to proving the perjury of Truesdell, establishes beyond a rea-

> sonable doubt that the defendant procured him to commit that perjury, you must acquit him. (Rec., p. 42.)

The charge fully covered every element in the request, and the court was not bound, having properly stated the law of the case, to restate it in the language requested by counsel.

There is no warrant for the statement made on page 48 of the brief, as follows:

> By refusing it when asked in the presence of the jury, the court practically said to them that an attorney, by continuing to prosecute a case in which he knows or even had good reason to believe that his client is testifying to a falsehood, is guilty of subornation of his perjury, if one he commits.

VI.

The next ground of reversal is based on the ninth assignment of error (brief, p. 48), which is as follows:

> The court erred upon the trial of said cause in refusing to charge the jury as requested by the plaintiff in error: "If you find, as the witness Craig testified, that instead of the defendant introducing Rice and Truesdell the day they made their final proofs, as Truesdell testified, the defendant at or shortly before that time introduced Rice and Craig, and upon inquiry by him was told by Truesdell that he and Rice had been neighbors for several years, you must acquit the defendant upon the indictment with reference to the Rice claim, unless you find that he knew that Truesdell was making an untruthful statement in so stating to him;" to which refusal of the court to charge the jury as requested by him the plaintiff in error did then and there duly except. (Rec., p. 50.)

This exception, and the one treated in connection with it, are based upon the fact that the court left the jury to find upon all the facts, and did not instruct them specially upon particular parts of the testimony.

If the court submitted all of the evidence to the jury upon a proper charge, and there was any evidence tending to sustain the verdict, it would be no ground for reversal that the court did not comment upon the testimony of particular witnesses.

It is no ground for reversal that the testimony was not sufficient to sustain the verdict.

VII.

The record leaves no doubt of the guilt of plaintiff in error.

While I say, regretfully, "'tis true, 'tis pity, and pity 'tis 'tis true," nevertheless, since it is true, it affords me infinite satisfaction to add that I find no error in the proceedings, and request an affirmance.

Plaintiff in error was a lawyer. It was his sacred trust to minister as a levite in the temple of justice. The greatest reproach upon the law is brought by those who, while sworn to guard, yet defile its purity.

While we can not but lament the fall, the occasion affords consolation in that it has been demonstrated that the law is strong enough to say "where the offense is let the great ax fall," deeming it profitable, if one member offends, to cut it off and cast it away, that the whole body may not perish.

J. M. Dickinson,
Assistant Attorney-General.